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Supreme Court of the United States

DERRICK TODD LEE,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition for a Writ of Certiorari to the Louisiana Court of Appeal, First Circuit

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Derrick Todd Lee respectfully petitions for a writ of certiorari to the Louisiana First Circuit Court of Appeal in *State v. Lee*, No. 2005 KA 0456.

OPINIONS BELOW

The judgment of the Louisiana First Circuit Court of Appeal is reported at 964 So. 2d 967 (La. App. 2007), and is reprinted at App. 1a. The Louisiana Supreme Court's order denying review of that decision is unpublished and is reprinted at App. 66a.

JURISDICTIONAL STATEMENT

The judgment and opinion of the Louisiana First Circuit Court of Appeal was entered on May 16, 2007. The Louisiana Supreme Court denied review of this decision on March 7, 2008. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Article 782 of the Louisiana Code of Criminal Procedure provides, in pertinent part: "Cases in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict."

STATEMENT OF THE CASE

This case raises an issue that goes to the heart of our Constitution's guarantee that individuals accused of a crime receive certain fundamental procedural protections: whether a jury may convict a defendant of a crime based on a less than unanimous jury verdict. Thirty-six years ago, in *Apodaca v. Oregon*, 406 U.S. 404 (1972), this Court held in a 4-1-4 decision that the Sixth and Fourteenth Amendments do not prohibit States from securing criminal convictions in this manner. Subsequent legal developments and academic studies call this result into serious question.

1. In the evening of January 14, 2002, Darren DeSoto reported that he had found his wife, Geralyn Barr Desoto, dead on the floor of her trailer home. She had been stabbed to death and was lying in a pool of blood. There were no eyewitnesses to the crime.

A West Baton Rouge grand jury charged Petitioner Derrick Todd Lee with the first degree murder of Ms. DeSoto. The State simultaneously suspected that Petitioner had committed two other violent crimes in 2002 – a rape and murder in one case, and an attempted rape and attempted murder in another. The evidence linking Petitioner to *this* murder, however, was limited and "circumstantial." App. 41a. In its totality, the State evidence showed that: DNA analysis secured from scrapings of Ms. DeSoto's fingernails "indicat[ed that] a male member of [Petitioner's] family was the perpetrator[;] a boot print at the scene of the murder possibly [was] made by defendant's boot[; Petitioner] traveled a route on the day of the murder that brought him within 200 yards of the victim's home[;] and [Petitioner] carried a knife consistent with the type of knife used to kill the victim." App. 40a.

In pre-trial proceedings, the trial court denied Petitioner's motion to suppress the State's DNA evidence on the ground that that the State obtained Petitioner's DNA in violation of the Fourth Amendment because the police had not obtained a search warrant for its collection. The State also secured the trial court's permission to introduce the evidence it had linking Petitioner to the other violent crimes.

On the eve of trial, the State amended the charge against Petitioner to second-degree murder. While first-degree murder in Louisiana is a capital crime and requires a unanimous verdict to convict, second-degree murder is punishable only by life in prison and does not require unanimity to convict. The State

in such a prosecution need only persuade ten of twelve jurors to vote guilty in order to secure a conviction. La. C. Cr. P. Art. 782.

Some of the evidence at trial undercut the State's already-thin case. Forensic testimony demonstrated that the DNA under Ms. DeSoto's fingernails came from more than one source. The forensic examiner also testified that the DNA could have come from Mr. DeSoto rather than Petitioner.

The jury nonetheless found Petitioner guilty of second degree murder. Polling of the jury revealed that one juror, Amanda Landry, had voted "not guilty" and did not concur in the verdict. Petitioner moved for a mistrial based upon the non-unanimous jury verdict, but the trial court denied his motion. The trial court sentenced Petitioner to life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence.

2. The Louisiana Court of Appeal affirmed Petitioner's conviction. The appellate court rejected Petitioner's Fourth Amendment argument, holding that even though the Fourth Amendment generally requires investigators to obtain search warrants from neutral and detached magistrates, it was permissible for the Louisiana Attorney General's Office to issue a subpoena duces tecum for Petitioner's biological material. App. 21a-22a. The appellate court also found that the trial court had erred in allowing the State to introduce evidence linking Petitioner to the rape and murder in 2002. But the appellate court found that error harmless, and it

further held that there was sufficient remaining evidence to support the verdict.

Finally, the Louisiana Court of Appeal rejected Petitioner's argument that it was unconstitutional to convict him of a crime by a non-unanimous jury verdict. Relying on this Court's 4-1-4 decision in *Apodaca v. Oregon,* 406 U.S. 404 (1972), the appellate court held that "under both state and federal jurisprudence, a criminal conviction by a less than a unanimous jury does not violate a defendant's right to trial by jury specified by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment." App. 3a-4a.

3. Petitioner sought discretionary review in the Louisiana Supreme Court, arguing among other things that his DNA evidence should have been suppressed and that convicting him by a non-unanimous jury verdict violated the Sixth and Fourteenth Amendments. *See* Deft's Orig. App. for Writ of Certiorari or Review, at 23-24. The Louisiana Supreme Court denied discretionary review without comment. App. 66a

REASONS FOR GRANTING THE WRIT

Louisiana is one of two states in this country that allow a person to be convicted of a felony by a less than unanimous jury verdict. (Oregon is the other. *See* Or. Const. art. I § 11.) This practice contravenes literally centuries of common law, as well as longstanding American precedent, requiring unanimity to convict in criminal cases.

Nevertheless, in *Apodaca v. Oregon*, 406 U.S. 404 (1972), a bare majority of this Court – in a deeply fractured, internally contradictory decision – held that the Constitution does not forbid Louisiana and Oregon from securing convictions by non-unanimous verdicts.

Subsequent developments in this Court's Sixth and Fourteenth Amendment jurisprudence dictate that this Court should reconsider the result in *Apodaca*. The two opinions that comprise the five-vote judgment in *Apodaca* use constitutional methodologies that this Court has long since abandoned. Worse yet, the result in *Apodaca* is squarely inconsistent with this Court's recent, repeated pronouncements in cases reviewing criminal convictions from state courts that the Sixth Amendment requires "that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the *unanimous* suffrage of twelve of his equals and neighbours.'" *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (emphasis added) (quoting William Blackstone, Commentaries on the Laws of England *343 (1769)); *accord Apprendi v. New Jersey,* 530 U.S. 466, 477 (2000). In light of the minimal force of *stare decisis* in this context and great importance of the constitutional right at stake, this Court should grant certiorari to make clear that states in our Union must conduct criminal trials according to the time-honored method of requiring unanimous verdicts to convict.

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE WHETHER THE CONSTITUTION ALLOWS STATES TO SECURE CRIMINAL CONVICTIONS BY NON-UNANIMOUS JURY VERDICTS.

A. This Court's Recent Jurisprudence Has Severely Undercut its Fractured Holding in 1972 that the Constitution Permits Convictions in State Criminal Trials by Non-Unamimous Verdicts.

A comparison between *Apodaca v. Oregon*, 406 U.S. 404 (1972), and this Court's modern Sixth and Fourteenth Amendment jurisprudence demonstrates that the two have become irreconcilable.

1. *Apodaca v. Oregon*

The question whether the Constitution permits a State to convict an individual of a crime based on a non-unanimous jury verdict turns on two sub-issues: (1) whether the Sixth Amendment's jury trial clause requires unanimity for criminal convictions; and (2) if so, whether that constitutional rule applies to the States by means of the Fourteenth Amendment. In *Apodaca*, five Justices answered the first sub-issue affirmatively, and eight answered the second affirmatively (or at least assumed the answer was yes). Yet because of the odd voting patterns in the Court's badly fractured 4-1-4 decision, the Court nevertheless ruled by a bare majority that States may convict individuals of crimes notwithstanding one or two jurors voting "not guilty."

a. The four-Justice plurality in *Apodaca* acknowledged that it had been "settled" since "the latter half of the 14th century . . . that a verdict had to be unanimous" to convict someone of a crime and that this requirement "had become an accepted feature of the common-law jury by the 18th century." *Id.* at 407-08 & n.2. Indeed, this Court had held or assumed in numerous previous cases that the Sixth Amendment required unanimity for a criminal conviction. *See Andres v. United States,* 333 U.S. 740, 748 (1948) ("Unanimity in jury verdicts is required" where the Sixth Amendment applies); *accord Patton v. United States,* 281 U.S. 276, 288 (1930); *Maxwell v. Dow,* 176 U.S. 581, 586 (1900); *Thompson v. Utah,* 170 U.S. 343, 351 (1898). Justice Story likewise explained in his noted Commentaries that any law dispensing with the requirement that jurors "must *unanimously* concur in the guilt of the accused before a legal conviction can be had . . . may be considered unconstitutional." 2 Joseph Story, Commentaries on the Constitution § 1779 n.2 (1891) (emphasis in original). And this Court had long since resolved that the Seventh Amendment's jury trial guarantee for civil trials required unanimity. *See American Pub. Co. v. Fisher,* 166 U.S. 464, 467-68 (1897).

The *Apodaca* plurality nonetheless concluded that the unanimity requirement "was not of constitutional stature" in criminal cases. 406 U.S. at 406. It did so for two primary reasons. First, the plurality asserted that instead of following history, "[o]ur inquiry must focus upon the *function* served by the

jury in contemporary society." *Id.* at 410 (emphasis added). After identifying the jury's function as interposing "the commonsense judgment of a group of laymen" between the accused and his accuser, the plurality found that "[i]n terms of this function we perceive no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one." *Id.* at 410-11 (quotation omitted).

Second, in response to Petitioners' argument that the Sixth Amendment requires jury unanimity in part "to give effect of the reasonable-doubt standard," the plurality asserted that "the Sixth Amendment does not require proof beyond a reasonable doubt at all." *Id.* at 412. "We are quite sure," the plurality emphasized, "that the Sixth Amendment itself has never been held to require proof beyond a reasonable doubt in criminal cases." *Id.* at 411.

b. Justice Powell provided a fifth vote by concurring in the plurality judgment. He did so, however, by disagreeing with the plurality on both sub-issues presented in the case. In his joint opinion respecting *Apodaca* and a companion case, Justice Powell stated that he believed, "in accord with both history and precedent, that the Sixth Amendment requires a unanimous jury verdict to convict in a federal criminal trial." *Johnson v. Louisiana,* 406 U.S. 366, 371 (1972) (Powell, J., concurring in the judgment). But he also expressly rejected the plurality's "major premise" that "the concept of jury trial, as applicable to the States under the Fourteenth Amendment, must be identical in every

detail to the concept required by the Sixth Amendment." *Id.* at 369. "Viewing the unanimity controversy as one requiring a fresh look at the question of what is fundamental in jury trial," Justice Powell found "no reason to believe . . . that a unanimous decision of 12 jurors is more likely to serve the high purpose of jury trial, or is entitled to greater respect in the community, than the same decision joined by 10 members of a jury of 12." *Id.* at 374, 376.

c. The four dissenters objected to the Court's judgment as a "radical departure from American traditions." *Johnson,* 406 U.S. at 381 (Douglas, J., dissenting). The dissenters bemoaned the plurality's decision to abandon the previously "universal[] understanding that a unanimous verdict is an essential element of a Sixth Amendment jury trial." *Apodaca,* 406 U.S. at 414 (Stewart, J., dissenting); *see also Johnson,* 406 U.S. at 395 (Brennan, J., dissenting); *id.* at 399 (Marshall, J., dissenting). The dissenters also disagreed with Justice Powell's rejection of the settled rule that the Sixth Amendment's jury trial guarantee "is made *wholly* applicable to state criminal trials by the Fourteenth Amendment." *Apodaca,* 406 U.S. at 414 (Stewart, J., dissenting) (emphasis added).

As Justice Brennan summed up the situation:

> Readers of today's opinions may be understandably puzzled why convictions by 11-1 and 10-2 jury votes are affirmed in [*Apodaca*], when a majority of the Court agrees that the

> Sixth Amendment requires a unanimous verdict in federal criminal jury trials, and a majority also agrees that the right to jury trial guaranteed by the Sixth Amendment is to be enforced against the States according to the same standards that protect that right against federal encroachment. The reason is that while my Brother Powell agrees that a unanimous verdict is required in federal criminal trials, he does not agree that the Sixth Amendment right to a jury trial is to be applied in the same way to State and Federal Governments.

Johnson v. Louisiana, 406 U.S. at 395 (Brennan, J. *dissenting*).

2. This Court's Current Sixth Amendment Jurisprudence

This Court's modern approach to Sixth Amendment jurisprudence renders *Apodaca* anachronistic. In fact, all three theoretical predicates on which the plurality and Justice Powell's opinions are based have been substantially undercut – if not brought directly into disrepute – by this Court's recent Sixth Amendment decisions.

a. While the *Apodaca* plurality focused "upon the function served by the jury in contemporary society," 406 U.S. at 410, this Court recently has made clear that the Sixth Amendment derives its meaning not from some abstract functional analysis but rather from the original understanding of the guarantees contained therein. In *Crawford v. Washington,* 541

U.S. 36 (2004), this Court abandoned the functional, reliability-based conception of the Confrontation Clause embodied in *Ohio v. Roberts,* 448 U.S. 56 (1980), in favor of the common-law conception of the right known to the Framers. In *United States v. Gonzalez-Lopez,* 548 U.S. 140 (2006), this Court rejected an approach to the right to counsel that would have "abstract[ed] from the right to its purposes" and left it to this Court whether to give effect "to the details." *Id.* at 145 (quotation omitted). And, most importantly, in a line of cases beginning with *Apprendi v. New Jersey,* 530 U.S. 466 (2000), this Court has eschewed a functional approach to the right to jury trial in favor of the "practice" of trial by jury as it existed "at common law." *Id.* at 480. In the course of holding that all sentencing factors that increase a defendant's potential punishment must be proven to a jury beyond a reasonable doubt, this Court emphasized that "[u]ltimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice." *Blakely v. Washington,* 542 U.S. 296, 313 (2004). Rather, the controlling datum is "the Framers' paradigm for criminal justice." *Id.*

This pronounced shift in constitutional methodology itself calls *Apodaca* into serious question. But this Court has gone further. In the *Apprendi* line of cases, this Court explicitly has reaffirmed that the "longstanding tenets of common-law criminal jurisprudence" that the Sixth Amendment embodies include the rule "that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the *unanimous* suffrage of twelve of his equals

and neighbours.'" *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (emphasis added) (quoting William Blackstone, Commentaries on the Laws of England 343 (1769). This Court further explained in *Booker v. United States*:

> More important than the language used in our holding in *Apprendi* are the principles we sought to vindicate. . . . As we noted in *Apprendi*:
>
> "[T]he historical foundation for our recognition of these principles extends down centuries into the common law. '[T]o guard against a spirit of oppression and tyranny on the part of rulers,' and 'as the great bulwark of [our] civil and political liberties,' trial by jury has been understood to require that '*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the *unanimous* suffrage of twelve of [the defendant's] equals and neighbours . . . .'"

543 U.S. 220, 238-239 (2005) (second emphasis added) (quotation omitted); *see also Apprendi*, 530 U.S. at 498 (Scalia, J. concurring) (charges against the accused must be determined "beyond a reasonable doubt by *the unanimous vote of 12 of his fellow citizens*") (emphasis in original).

The *Apodaca* plurality's view of the Sixth Amendment cannot be squared with these repeated pronouncements.

b. This Court has disregarded the *Apodaca* plurality's assertion that 'the Sixth Amendment does not require proof beyond a reasonable doubt at all." 406 U.S. at 412. In *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993), this Court unanimously held:

> It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as [*In re Winship*, 397 U.S. 358 (1970)] requires) whether he is guilty beyond a reasonable doubt. *In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.*

Sullivan, 508 U.S. at 278 (second emphasis added). The *Sullivan* Court concluded that a defendant's "Sixth Amendment right to jury trial" is "denied" when a jury instruction improperly defines the concept of reasonable doubt. *Id.*

This Court likewise explained in *Cunningham v. California*, 127 S. Ct. 856 (2007) – the latest case applying the *Apprendi* rule to a state sentencing system – that "[t]his Court has repeatedly held that, *under the Sixth Amendment*, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, *and established beyond*

a reasonable doubt, not merely by a preponderance of the evidence." *Id.* at 863-64 (emphasis added).

It takes little reflection to perceive that the holdings and reasoning in *Sullivan* and *Cunningham* are in serious tension with the plurality's reasoning in *Apodaca*. The pronouncements respecting the Sixth Amendment in all three cases cannot all be right.

c. Even when *Apodaca* was decided, Justice Powell's notion of applying a clause in the Bill of Rights in a piecemeal manner to state proceedings was difficult to square with this Court's previous "reject[ion of] the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.'" *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964) (quoting *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 275 (1960)). But whatever its viability in 1972, this Court's modern Sixth Amendment jurisprudence has long since rendered Justice Powell's "partial incorporation" methodology untenable. In *Crist v. Bretz*, 437 U.S. 28 (1978), the state argued that a particular aspect of the Fifth Amendment's double jeopardy guarantee should not be incorporated against the States. Although Justice Powell agreed with this argument, this Court rejected it, holding that when a component of the Bill of Rights that applies against the States is "a settled part of constitutional law" and protects legitimate interests of the accused, it must apply with equal force to the States. *Id.* at 37-38.

The *Crist* case, decided thirty years ago, dispensed with any possibility of Justice Powell's views ever gaining sway on this Court. "In the years since *Crist*, . . . [n]o member of the Court has suggested . . . that [a] particular requirement might not be constitutionally demanded for state proceedings while constitutionally mandated in federal proceedings. . . . Thus, absolute parallelism seems to be a settled principle." Wayne R. LaFave et. al, Criminal Procedure § 2.6(c), at 67-68 (4th ed. 2004).

This Court's modern Sixth Amendment decisions are fully consistent with this observation. In *Apprendi*, *Ring*, *Blakely*, and *Cunningham*, this Court applied the *Apprendi* rule to state proceedings without even pausing to consider whether that aspect of the right to trial by jury applied to the States. This Court, in recent years, has proceeded in the same holistic manner with respect to the Sixth Amendment's Confrontation Clause, *see Crawford*, 541 U.S. 36; *Davis v. Washington*, 547 U.S. 813 (2006); the right to counsel, *Alabama v. Shelton*, 535 U.S. 654 (2002); *Strickland v. Washington*, 466 U.S. 669 (1984); and the right to compulsory process, *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). Justice Powell's controlling methodology in *Apodaca* stands as the sole exception to decades of otherwise unbroken precedent.[1]

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[1] To be sure, this Court has held that some guarantees in the Bill of Rights, such as the Fifth Amendment's Grand Jury Clause, do not apply to the States at all. *See Beck v. Washington*, 369 U.S. 541, 545 (1962); *Hurtado v. California*, 110 U.S. 516 (1884). But Justice Powell's opinion in *Apodaca*

Even if the question here were still fundamentally considered one of due process, Justice Powell's analysis would still contradict this Court's modern case law. Justice Powell approached the incorporation in *Apodaca* as depending on a "fresh look" at what elements of the right to jury trial are essential. 406 U.S. at 376. This Court, however, has made clear in recent decisions that due process does not depend upon the subjective views of individual Justices regarding the importance or desirability of given practices. Rather, the "crucial guideposts" in due process cases are now "[o]ur Nation's history, legal traditions, and practices." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quotation omitted); *see also Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion) (due process requires adherence to rights that are "deeply rooted in this Nation's history and tradition"). As even Justice Powell recognized, those historical guideposts demonstrate that at the time of the Founding, "unanimity had long been established as one of the attributes of a jury conviction." *Johnson*, 406 U.S. at 371 (Powell, J., concurring in the judgment in *Apodaca*); *see also supra* at 8 (collecting other historical citations). That reality should settle the question.

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stands alone as holding that a component of the Bill of Rights that *does* apply to state proceedings does not apply in the same manner as in federal trials.

B. The Doctrine of *Stare Decisis* Does Not Pose a Significant Impediment to Reconsidering the Question Presented Afresh.

For three reasons, the doctrine of *stare decisis* should not stand in the way of this Court's reconsidering the result in *Apodaca* in light of this Court's recent approach to the Sixth Amendment.

1. Principles of *stare decisis* are at their nadir where a plurality opinion renders a judgment but is unable to muster a controlling view concerning the law. In *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), for example, this Court reconsidered and overturned a prior decision – *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) – in part because "a majority of the Court [the concurring opinion providing the fifth vote, as well as the dissent had] expressly disagreed with the rationale of the plurality." *Id.* at 66.

The same is true here. *Apodaca* was a deeply fractured decision. Both Justice Powell's concurrence and the four dissenters expressly disagreed with the plurality's view that the Sixth Amendment does not require unanimous verdicts to convict. Furthermore, the eight other Justices on the Court disagreed with Justice Powell's "partial incorporation" rationale. *Apodaca,* therefore, is entitled only to "questionable precedential value." *Seminole Tribe,* 517 U.S. at 66.

2. *Stare decisis* has minimal force when the decision at issue "involves collision with prior doc-

trine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock,* 309 U.S. 106, 119 (1940). Indeed, "[r]emaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it." *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 231 (1995). When faced with such situations, therefore, this Court repeatedly has determined that the better course is to reinstate the prior, traditional doctrine. *See id.* at 231-32; *United States v. Dixon,* 509 U.S. 688, 704 (1993) (overruling recent decision that "lack[ed] constitutional roots" and was "wholly inconsistent with earlier Supreme Court precedent"); *Solorio v. United States*, 483 U.S. 435, 439-41 (1987) (overruling decision that had broken from an earlier line of decisions "from 1866 to 1960"); *Continental T.V., Inc., v. GTE Sylvania, Inc.*, 433 U.S. 36, 47-48 (1977) (overruling case that was "an abrupt and largely unexplained departure" from precedent); *Swift & Co. v. Wickham*, 382 U.S. 111, 128-29 (1965) (overruling recent decision to reinstate the "view . . . which this Court ha[d] traditionally taken" in earlier cases).

As Justice Powell and the dissenters in *Apodaca* noted without contradiction from the plurality, the plurality's view that the Sixth Amendment does not require unanimity broke sharply from "an unbroken line of cases reaching back to the late 1800's" – and, indeed, from hundreds of years of common law practice. *Johnson*, 406 U.S. at 369 (Powell, J., concurring in the judgment in *Apodaca*); *see also*

Apodaca, 406 U.S. at 414-15 (Stewart J., dissenting) ("Until today, it has been universally understood that a unanimous verdict is an essential element of a Sixth Amendment jury trial. . . . I would follow these settled Sixth Amendment precedents and reverse the judgment before us.") (citations omitted). Justice Powell's "partial incorporation" rationale likewise ignored this Court's prior precedent that "the Sixth Amendment right to trial by jury in a federal criminal case is made *wholly* applicable to state criminal trials by the Fourteenth Amendment." *Apodaca*, 406 U.S. at 414 (Stewart J., dissenting) (emphasis added); *see also supra,* at 10. Overruling *Apodaca*, therefore, would do nothing more than reinstate the traditional meaning of the Sixth and Fourteenth Amendments. It also would extinguish the schism with this Court's longstanding Seventh Amendment jurisprudence requiring unanimity in civil cases.

3. *Stare decisis* considerations wane considerably "in cases . . . involving procedural and evidentiary rules," in part because such rules generally do not induce the same kinds of individual or societal reliance as other kinds of legal doctrines. *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991). Such is the case here. The rules governing juror voting are quintessentially procedural rules. What is more, in the thirty-six years since *Apodaca* was decided, not a single state has retreated from its requirement that jury verdicts be unanimous to convict in criminal cases. Louisiana and Oregon remain the sole outliers and are in exactly the same position as they were in 1972. And no other constitutional doctrine

or legislation depends on the continued validity of *Apodaca*. To the contrary, *Apodaca* is an increasingly unexplainable anomaly in this Court's constitutional criminal procedure jurisprudence.

C. The Question Whether States May Continue to Convict Individuals of Serious Crimes Based on Non-Unanimous Verdicts is Extremely Important and Ripe for Consideration.

1. Empirical research conducted since *Apodaca* was decided confirms the wisdom of the historical unanimity requirement and highlights the importance of enforcing that constitutional mandate. The *Apodaca* plurality defended its decision in part based on its assumption that a unanimity requirement "does not materially contribute to the exercise" of a jury's "commonsense judgment." 406 U.S. at 410. The plurality prophesized:

> [W]e perceive no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one. Requiring unanimity would obviously produce hung juries in some situations where nonunanimous juries will convict or acquit. But in either case, the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him is equally well served.

Id. at 411 (footnote omitted).

Evidence amassed from both mock juries and actual Arizona jury deliberations occurring over the last half-century has revealed that the plurality's assumptions were incorrect. Specifically, "[s]tudies suggest that where unanimity is required, jurors evaluate evidence more thoroughly, spend more time deliberating and take more ballots." American Bar Association, American Jury Project, *Principles for Juries and Jury Trials* 24, available at http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf (last accessed June 3, 2008). As Professors Shari Seidman Diamond, Mary R. Rose, and Beth Murphy explain:

> The Arizona jury deliberations reveal that some of the claims made in favor of dispensing with unanimity are unfounded. The image of eccentric holdout jurors outvoted by sensible majorities receives no support. Indeed, the judge agreed with the verdict favored by the holdouts in a number of these cases. Instead, the deliberations demonstrate that thoughtful minorities are sometimes marginalized when the majority has the power to ignore them in reaching a verdict. Although juries generally engage in serious and intense deliberations, jurors themselves report more thorough and open-minded debate when they reach unanimity.

> The primary cost frequently attributed to the unanimity requirement is that it increases the rate of hung juries, a cost that seems overblown in light of the low frequency of hung juries in civil cases, even when unanimity is required. More importantly, a slight increase in hung juries and the potential for a longer deliberation may be costs outweighed by the benefits of a tool that can stimulate robust debate and potentially decrease the likelihood of an anomalous verdict.

Shari Seidman Diamond, et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 Nw. U. L. Rev. 201, 230 (2006). Other scholars have reached similar conclusions. *See* Kim Taylor Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1272 (2000) (noting "[a] shift to majority rule appears to alter both the quality of the deliberative process and the accuracy of the jury's judgment"); John Guinther, The Jury in America 81 (1988) (finding that non-unanimous juries correct each other's errors of fact less frequently than do jurors required to reach unanimity).

The *Apodaca* plurality further assumed that allowing non-unanimous verdicts would not marginalize jurors who are members of minority groups. 406 U.S. at 413. This assumption also appears misguided. After considering the effect of non-unanimity rules on dissenting voices, the American Bar Association's American Jury Project concluded

that "[a] non-unanimous decision rule allows juries to reach a quorum without seriously considering minority voices, thereby effectively silencing those voices and negating their participation." *See* Principles for Juries and Jury Trials, *supra*, at 24. Empirical studies corroborate the fact that jurors in the minority contribute more vigorously to jury deliberations when operating under a unanimous verdict scheme. *See id.*; Reid Hastie et al., Inside the Jury 108-12 (1983). It thus comes as no surprise that members of racial and ethnic minorities are often the ones who are outvoted in non-unanimous verdicts. *See, e.g., State v. Potter*, 591 So. 2d 1166, 1167 (La. 1991) ("The vote was eleven to one with the sole 'not guilty' vote cast by one of the black members of the jury. Eleven blacks were peremptorily challenged by the state during voir dire . . . ."). Such verdicts-by-majority-rule undermine the public credibility of our judicial system. *See* Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1278 (2000).

The comprehensive empirical research affirming the wisdom of the unanimity requirement, as well as the disproportionately negative impact of non-unanimity rules on jurors of color, led the American Bar Association to conclude that "[a] unanimous decision should be required in all criminal cases heard by a jury." *Principles for Juries and Jury Trials, supra*, at 23. Numerous other organizations and commentators have concluded the same. *See, e.g.*, Dennis J. Divine, et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622, 669 (2001) (reviewing

all available social science and concluding that laws allowing non-unanimous verdicts matter when prosecution's case "is not particularly weak or strong").

2. The consequences of Louisiana and Oregon continuing to allow criminal convictions based on non-unanimous jury verdicts are serious and will continue until this Court steps in. It is not at all uncommon for defendants in these populous states to be convicted by non-unanimous verdicts.[2] Such

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[2] This statement is based on discussions with public defender offices and other criminal defense attorneys in Louisiana and Oregon. Neither State keeps any statistics of which we are aware concerning the frequency of convictions by non-unanimous verdicts. But it seems that non-unanimous verdicts occur with some regularity in single-charge cases and perhaps even more often than not in complicated, multi-count cases.

Over the past five years, the Louisiana appellate courts have noted over forty cases in which defendants were convicted of crimes by non-unanimous verdicts. *See State v. Ruiz*, 955 So. 2d 81, 83 (La. 2007); *State v. Elie*, 936 So. 2d 791, 794 (La. 2006); *State v. Mizell*, 938 So. 2d 712, 713 (La. App. 2006); *State v. Mack*, No. 43-KA-206, 2008 La. App. LEXIS 585 (La. App. Apr. 23, 2008); *State v. Brantley*, 975 So. 2d 849, 851 (La. App. 2008); *State v. Gullette*, 975 So. 2d 753, 758 (La. App. 2008); *State v. Linn*, 975 So. 2d 771, 772 (La. App. 2008); *State v. Carter*, 974 So. 2d 181, 184 (La. App. 2008); *State v. Ross*, 973 So. 2d 168, 171 (La. App. 2007); *State v. Baker*, 962 So. 2d 1198, 1201 (La. App. 2007); *State v. Allen*, 955 So. 2d 742, 746 (La. App. 2007); *State v. Tensley*, 955 So. 2d 227, 231 (La. App. 2007); *State v. Johnson*, 948 So. 2d 1229, 1239 (La. App. 2007); *State v. Williams*, 950 So. 2d 126, 129 (La. App. 2007); *State v. Mayeux*, 949 So. 2d 520, 535 (La. App. 2007); *State v. Brown*, 943 So. 2d 614, 620 (La. App. 2006); *State v. Payne*, 945 So. 2d 749, 750 (La. App. 2006); *State v. Riley*, 941 So. 2d 618, 622 (La. App. 2006); *State v. Chandler*, 939 So. 2d 574, 576 (La. App. 2006); *State v. Smith*, 936 So. 2d 255, 259 (La. App. 2006);

defendants have pressed the constitutional argument made herein in recent years, but have continually been told that only this Court can declare that *Apodaca* is no longer good law. *See* App. 3a-4a; *State v. Smith*, 952 So. 2d 1, 16 (La. App. 2006), *writ denied*, 964 So. 2d 352 (La. 2007); *State v. Newman*, 2006 WL 3813692, at *5 (La. App. 2006) (unpublished opinion); *State v. Caples*, 938 So. 2d 147, 157 (La. App. 2006), *writ denied*, 955 So. 2d 684 (La. 2007); *State v. Juniors*, 918 So. 2d 1137, 1147-48 (La. App. 2005), *writ denied*, 936 So. 2d 1257 (La. 2006), *cert. denied*, 127 S. Ct. 1293 (2007); *State v. Divers*, 889 So. 2d 335, 353 (La. App. 2004), *writ*.

State v. Davis, 935 So. 2d 763, 766 (La. App. 2006); *State v. Scroggins*, 926 So. 2d 64, 65 (La. App. 2006); *State v. Houston*, 925 So. 2d 690, 706 (La. App. 2006); *State v. Christian*, 924 So. 2d 266 (La. App. 2006); *State v. Zeigler*, 920 So. 2d 949, 952 (La. App. 2006); *State v. Wilhite*, 917 So. 2d 1252, 1258 (La. App. 2005); *State v. Hurd*, 917 So. 2d 567, 568 (La. App. 2005); *State v. Wiley*, 914 So. 2d 1117, 1121 (La. App. 2005); *State v. Bowers*, 909 So. 2d 1038, 1043 (La. App. 2005); *State v. Dabney*, 908 So. 2d 60, 65 (La. App. 2005); *State v. Jackson*, 904 So. 2d 907, 909 (La. App. 2005); *State v. Williams*, 901 So. 2d 1171, 1177 (La. App. 2005); *State v. Jackson*, 892 So. 2d 71, 73 (La. App. 2004); *State v. King*, 886 So. 2d 598 (La. App. 2004); *State v. Nguyen*, 888 So. 2d 900, 904 (La. App. 2004); *State v. Tauzin*, 880 So. 2d 157, 158 (La. App. 2004); *State v. Shrader*, 881 So. 2d 147, 150 (La. App. 2004); *State v. Williams*, 878 So. 2d 765, 778 (La. App. 2004) (Thibodeaux, J. dissenting); *State v. Guiden*, 873 So. 2d 835, 837 (La. App. 2004); *State v. Brown*, 874 So. 2d 318, 328 (La. App. 2004); *State v. Harris*, 868 So. 2d 886, 890 (La. App. 2004); *State v. Moore*, 865 So. 2d 227, 232 (La. App. 2004); *State v. McKinnie*, 850 So. 2d 959, 960 (La. App. 2003).

We understand that an amicus brief filed in support of this petition will provide additional information regarding the Oregon experience with non-unanimous verdicts.

denied, 899 So. 2d 2 (La. 2005), *cert. denied*, 546 U.S. 939 (2005); *State v. Sharp*, 810 So. 2d 1179, 1193-94 (La. App. 2002), *writ denied*, 845 So. 2d 1081 (La. 2003); *State v. Bowen*, 168 P.3d 1208, 1209 (Or. App. 2007) (same); *State v. Miller*, 166 P.3d 591, 599 (Or. App. 2007), *opinion modified on reh'g*, 176 P.3d 425 (Or. App. 2008); *State v. Phillips*, 174 P.3d 1032, 1037 (Or. App. 2007); *State v. Norman*, 174 P.3d 598, 604 (Or. App. 2007); *State v. Rennels*, 162 P.3d 1006, 1008 n.2 (Or. App. 2007). Petitioner respectfully requests that this Court do so now.

II. DNA EVIDENCE INTRODUCED AT PETITIONER'S TRIAL SHOULD HAVE BEEN SUPPRESSED AS THE PRODUCT OF AN UNCONSTITUTIONAL SEARCH AND SEIZURE.

The State obtained the key evidence leading to Petitioner's arrest and conviction – a biological sample containing his DNA – by means of a subpoena duces tecum issued by the Louisiana Attorney General's Office. The Louisiana Court of Appeal held that this procedure comported with the Fourth Amendment because the subpoena was sufficiently similar to an ordinary search warrant. App. 10a-23a. On appeal from Petitioner's separate conviction for capital murder, the Louisiana Supreme Court rejected this analysis, holding that the search and seizure of Petitioner's DNA violated the Fourth Amendment. *State v. Lee,* 976 So. 2d 109, 126-27 (La. 2008). The Louisiana Supreme Court, however, held that the DNA evidence did not need to be

suppressed because the inevitable discovery doctrine applied. *Id.* at 131.

Petitioner is challenging the Louisiana Supreme Court's inevitable-discovery ruling in a separate petition for certiorari, filed contemporaneously with this one. *See Lee v. Louisiana,* No. 07-____. In the event that this Court grants certiorari in that case, this Court should hold this case. And if this Court reverses the judgment in that case, it should grant, vacate, and remand, the Court of Appeal's opinion here for further proceedings. The Louisiana Supreme Court has repudiated the Court of Appeal's Fourth Amendment analysis, and a remand would allow Petitioner to litigate in light of this Court's opinion whether the inevitable discovery doctrine applies in this case.

* * * * * *

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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June 4, 2008

APPENDIX

APPENDIX A

Court of Appeal of Louisiana, First Circuit.
STATE of Louisiana
v.
Derrick Todd LEE.
No. 2005 KA 0456.

May 16, 2007

Before: PARRO, McDONALD, and HUGHES, JJ.

* * * * * * *

HUGHES, J.

Defendant Derrick Todd Lee was charged by grand jury indictment with the first degree murder of Geralyn Barr DeSoto, a violation of LSA-R.S. 14:30. The state amended the indictment to charge defendant with second degree murder, a violation of LSA-R.S. 14:30.1. The defendant pled not guilty. After a trial by jury defendant was found guilty as charged. Defendant made an oral motion for a new trial and an appeal. Subsequently, he filed a written motion for a new trial, an amended motion for a new trial, and a notice of intent to appeal. After a hearing, the trial court denied the motion for a new trial. Defendant then made an oral motion for mistrial that was also denied. After the appropriate delays, the trial court sentenced defendant to the mandatory term of life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence. Defendant now appeals, raising eight assignments of error.

FACTS

Darren DeSoto left his Addis trailer home around 7:00 a.m. on January 14, 2002 and drove to work. Geralyn DeSoto, Darren's wife and the victim in the instant matter, contacted an employment company about a position listed on the company's website. Geralyn was a student at Louisiana State University and was planning to attend graduate school in the fall of 2002. She wanted to work and save money to pay her future tuition. Between 9:00 and 10:00 a.m., someone from the agency contacted Geralyn and scheduled a job interview for 2:30 p.m. that day.

Geralyn drove to LSU to pay the tuition for a class she was taking during the spring semester. While there she met and talked with another student. Around 11:00 a.m. she left to return home. At 11:41 a.m. Geralyn sent an e-mail to one of her professors. At 11:50 a.m. a telephone call was placed from the telephone in Darren and Geralyn's trailer to a phone located at the Exxon refinery in Baton Rouge. The call lasted less than a minute. That afternoon Geralyn failed to appear for her job interview. The employment agency called Geralyn's home, but there was no answer.

Darren left his job around 6:15 p.m. He was concerned because he had called his wife several times during the day with no answer. He arrived home around 7:00 p.m. and found the trailer door slightly open. At first he did not believe his wife was home, but when he looked down the hall, he

discovered her lying on her side in a pool of blood. Darren touched his wife's body and found that it was cold. He also saw that her throat had been cut. He ran to the home of a neighbor, who called the police. Geralyn DeSoto was pronounced dead at the scene.

NON-UNANIMOUS JURY VERDICT

In assignment of error number one, defendant argues that in light of recent jurisprudence, LSA-C.Cr.P. art. 782(A) (providing for jury verdicts of 10 to 2 in cases in which punishment is necessarily confinement at hard labor) violates the Sixth and Fourteenth Amendments of the United States Constitution. Thus, the defendant contends that the 11 to 1 jury verdict was unconstitutional.

The state, citing Louisiana jurisprudence, contends that this issue is well-settled and that the Louisiana Supreme Court has held that a non-unanimous jury verdict does not violate the Constitution.

The punishment for second degree murder is confinement for life at hard labor. *See* LSA-R.S. 14:30.1(B). Louisiana Constitution Article I, § 17(A) and LSA-C.Cr.P. art. 782(A) provide that in cases where punishment is necessarily at hard labor, the case shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Under both state and federal jurisprudence, a criminal conviction by a less than a unanimous jury does not violate a defendant's right to trial by jury

specified by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment. *See Apodaca v. Oregon,* 406 U.S. 404 (1972); *State v. Belgard,* 410 So.2d 720, 726 (La. 1982); *State v. Shanks,* 715 So.2d 157, 164-65 (La. App. 1998).

The defendant's reliance on *Ring v. Arizona,* 536 U.S. 584 (2002), *Apprendi v. New Jersey,* 530 U.S. 466 (2000), and *Jones v. United States,* 526 U.S. 227 (1999), is misplaced. These Supreme Court decisions do not address the issue of the constitutionality of a non-unanimous jury verdict but rather, address the issue of whether the assessment of facts in determining an increased penalty of a crime beyond the prescribed statutory maximum is within the province of the jury or the sentencing judge. These decisions stand for the proposition that any fact (other than a prior conviction) that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *See Apprendi,* 530 U.S. at 490. Nothing in these decisions suggests that a jury's verdict must be unanimous. Accordingly, LSA-Const. art. I, § 17(A) and LSA-C.Cr.P. art. 782(A) are not unconstitutional and do not violate the defendant's Sixth Amendment right to a trial by jury.

This assignment of error lacks merit.

MOTION TO SUPPRESS DNA EVIDENCE

In assignment of error number two, defendant contends that his DNA sample was illegally obtained without a search warrant and that the trial court erred in denying his motion to suppress the DNA evidence.

Defendant's DNA was obtained by a subpoena duces tecum requested by the Louisiana Attorney General's Office. Defendant's DNA profile was matched to the DNA found on the victim in this case and also on D.A., a victim who survived an assault.

The "Motion For Issuance Of Subpoena Duces Tecum" was presented to Judge George H. Ware, Jr. of the 20th Judicial District. The motion explained that the Attorney General's Office was involved in an investigation of the disappearance of Randi Mebruer and the homicide of Connie Warner, both residents of Zachary, and that a DNA specimen of the defendant was necessary to complete this investigation. The motion indicated that the Department of Justice (Attorney General's Office) had been assisting the Zachary Police Department since April 27, 1999 in the investigation in the same Zachary subdivision of the disappearance of Ms. Mebruer from her Zachary residence on or about April 18, 1998 and the homicide of Ms. Warner in August of 1992. The motion further stated that the evidence at the Mebruer residence indicated that she was attacked, severely beaten, and abducted from her residence, and that the incident occurred during a four-hour

period between 10:30 p.m. on April 18 and 2:30 a.m. on April 19, 1998. The Zachary police knew the defendant had been arrested as a "Peeping Tom," pursuant to LSA-R.S. 14:284, in the same Zachary subdivision and in St. Francisville, Louisiana.

The motion further stated that on April 20, 1998 Zachary police officers went to defendant's residence and, with his consent, conducted a cursory search of his residence before being asked by the defendant to leave, and since that time, defendant remained a "viable suspect" in the disappearance of Randi Mebruer and a "possible suspect" in the deaths of five females in Baton Rouge and Lafayette who had been linked by DNA profiling to a serial killer.

The motion further indicated that investigators from the Attorney General's Office interviewed defendant and his girlfriend, Cassandra Green, who both indicated separately that on April 18 about 10:30 p.m., they were at a bar in St. Francisville. When they got into an argument, Ms. Green left and went to her home. The defendant drove to a bar in Alsen, Louisiana. He then left and drove to Ms. Green's home in Jackson, where he arrived about 1:00 a.m. on April 19. His route to Ms. Green's home took him directly by the entrance to the Zachary subdivision. Defendant talked to Ms. Green a few minutes and then drove to his home in St. Francisville.

The motion alleged that the Alsen lounge was open for business on April 18-April 19. It detailed

defendant's specific arrests and convictions for attempted unauthorized entry of an inhabited dwelling, simple burglary, "Peeping Tom," trespassing, stalking, and aggravated battery and noted that some of the arrests were in Zachary. The motion further alleged that defendant was not incarcerated on the dates of Randi Mebruer's disappearance and the murder of Connie Warner, or of the murders of Charlotte Pace, Gina Green, Pam Kinamore, Trineisha Colomb, and Carrie Yoder.

Finally, the motion indicated that a confidential source (CS) told investigators that defendant had come to his home in Jackson, Louisiana, around midnight "a night or two after Randi Mebruer's disappearance." The CS accompanied the defendant to his residence. In his vehicle, defendant had a long-barreled revolver. After ten to fifteen minutes at the defendant's residence, defendant drove the CS back to his home. Defendant told the CS that he was being harassed by Zachary police about a "missing woman." The next day the CS heard a news report about a missing Zachary woman. The motion did not give any other specific information as to the timing of defendant's statement.

An order was signed by Judge Ware on May 5, 2003 authorizing the issuance of a subpoena duces tecum and directing defendant to produce a DNA specimen. The defendant was swabbed and a DNA sample was obtained. Subsequently, after defendant's DNA was tested and compared, lab reports were issued indicating a high probability that

the DNA found on the victim Geralyn DeSoto and on D.A., who survived an attack, was that of the defendant.

At the Motion to Suppress hearing held on May 6, 2004, the only witness called by the state was Danny Mixon, an investigator with the Attorney General's Office. Mixon testified that he was assigned in April of 1999 to help the Zachary police investigate the Warner and Mebruer cases in which defendant was the main suspect. Connie Warner was killed in 1992 and Randi Mebruer, whose body has never been found, disappeared in 1998. The two victims lived in the same Zachary subdivision. Mr. Mixon further testified that defendant had been arrested on two counts of "Peeping Tom" in the same subdivision and for "Peeping Tom" and stalking in St. Francisville.

Mr. Mixon testified that a search warrant was not sought because it was believed the subpoena duces tecum was sufficient to obtain the DNA sample. He noted that he had previously used a subpoena duces tecum for handwriting samples, phone records, and fingerprints. Mixon and Zachary Police Officer Ray Day approached Judge Ware to have the subpoena duces tecum issued. Mixon noted that Judge Ware suggested a "show cause" hearing might be necessary. During Mixon's meeting with the judge, the Attorney General's Office was contacted, and the use of the subpoena duces tecum to obtain the DNA sample was advocated. Judge

Ware then signed an order authorizing the issuance of the subpoena.

Mixon testified that the subpoena was prepared in conjunction with the Warner and Mebruer cases. He noted that defendant had been caught on more than one occasion "walking, prowling, and peeping in windows" in the Oak Shadows subdivision in which both Ms. Warner and Ms. Mebruer had lived. The investigation indicated that Ms. Mebruer was attacked and abducted between 10:30 p.m. on Saturday, August 18, 1998 and 2:30 a.m. on August 19, 1998. During that time frame, defendant admitted to driving a route that would have taken him past Ms. Mebruer's Zachary subdivision; however, Mixon acknowledged that this route was the shortest route for defendant to follow to reach his destination. As to the fact that defendant was not in custody on the dates of the Warner and Mebruer attacks, Mixon further acknowledged that thousands of other people were not in jail on those dates. Mixon also testified as to the information received from the CS. According to Mixon, the CS stated that he had gone with defendant to defendant's home a night or two after Randi Mebruer's disappearance, that the defendant went into the back of the house, but did not turn on the lights. When he returned to the vehicle, the CS saw the defendant put a revolver in the console of his truck. The defendant told the CS that the Zachary police were harassing him about a missing white woman from Zachary.[1]

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[1] Mixon's testimony at trial differs slightly from the information contained in the "Motion for Issuance of Subpoena

At the conclusion of the hearing, the judge denied the motion to suppress. The judge found that the subpoena was essentially a search warrant and that the motion for the subpoena provided sufficient facts to establish probable cause. Defendant subsequently filed an application for supervisory writs, which was denied. *State v. Lee,* 2004-1129 (La. App. 1 Cir. 7/16/04) (unpublished), *writ denied,* 877 So.2d 997 (La. 2004).

In this appeal, defendant contends that the swabbing for his DNA sample was a warrantless search and seizure and did not fall within one of the exceptions for the warrant requirement. He further argues that the subpoena duces tecum was an improper vehicle to obtain his DNA, and the motion for the subpoena did not provide the necessary probable cause for the seizure.

As to the use of the subpoena to obtain the sample, defendant cites jurisprudence as support for his argument that his Fifth Amendment rights were violated. The state responds that the subpoena duces tecum was a valid means to obtain defendant's DNA sample, and like an affidavit supporting a search warrant, the motion was reviewed by a judge before the subpoena was issued.[2] The state argues a

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Duces Tecum." The motion represents that the CS saw the revolver when he first entered the defendant's vehicle and does not describe as "white" the missing woman from Zachary.

[2] The state also notes that in order to confirm the DNA results linking defendant to the murder of Geralyn DeSoto, after

neutral and detached reviewing judge made a determination that probable cause existed to obtain the sample.

Louisiana Code of Criminal Procedure article 66 provides for the issuance of a subpoena and subpoena duces tecum on the basis of reasonable grounds:[3]

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defendant was in custody the state obtained another sample by filing a motion to compel a DNA sample.

[3] Several Louisiana statutes provide authority for state intrusion based upon "reasonable grounds." LSA-R.S. 17:416.3 provides for the search of students' persons, desks, lockers, and other areas based upon reasonable grounds to suspect that the search will reveal evidence that the student has violated the law, a school rule, or a school board policy. LSA-R.S. 28:53 provides that a police officer may take a person into protective custody and transport him to a treatment facility for a medical evaluation when, as a result of his personal observation, the officer has reasonable grounds to believe the person is a proper subject for involuntary admission to a treatment facility because the person is acting in a manner dangerous to himself or dangerous to others, is gravely disabled, and is in need of immediate hospitalization to protect such a person or others from physical harm. LSA-R.S. 32:661(A)(1) provides for the implied consent to chemical testing for blood-alcohol content of persons operating motor vehicles in this state. LSA-R.S. 32:661(A)(2)(a) provides that the test shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person has been driving while under the influence of alcohol or a controlled dangerous substance. LSA-Ch. Code art. 621 allows a police officer to take a child into custody without a court order if he has reasonable grounds to believe that the child's surroundings are such as to endanger his welfare and immediate removal appears to be necessary for his protection.

A. Upon written motion of the attorney general or district attorney setting forth reasonable grounds therefor, the court may order the clerk to issue subpoenas directed to the persons named in the motion, ordering them to appear at a time and place designated in the order for questioning by the attorney general or district attorney respectively, concerning any offense under investigation by him. The court may also order the issuance of a subpoena duces tecum. Service of a subpoena or subpoena duces tecum issued pursuant to this Article upon motion of the attorney general may be made by any commissioned investigator from the attorney general's office, or in conformity with Article 734 of this Code.

B. The contumacious failure or refusal of the person subpoenaed to appear is punishable as a contempt of court.

C. The attorney general or district attorney, respectively, may determine who shall be present during the examination and may order all persons excluded, except counsel for the person subpoenaed.

Defendant cites *Mancusi v. DeForte,* 392 U.S. 364 (1968), in which the reviewing court determined that a subpoena duces tecum issued by the district attorney's office under a state statute did not justify

a warrantless search and seizure and conferred no right to seize the property referred to in the subpoena. In *Mancusi*, a union official instituted a habeas corpus proceeding, arguing that evidence received against him in the state prosecution had been seized in violation of his Fourth Amendment rights. The Supreme Court found that the search of the union office without a warrant, but with a subpoena duces tecum, was a prohibited, unreasonable search. The subpoena did not qualify as a valid search warrant under the Fourth Amendment because it was issued by the District Attorney himself and thus omitted the indispensable condition that the inferences from the facts of the complaint be drawn by a neutral and detached magistrate instead of law enforcement officers. *Mancusi*, 392 U.S. at 371.

Mancusi is distinguishable from the instant case.

Although both cases involved the initiation of a subpoena duces tecum by the prosecuting entity, in this case a judge reviewed the facts presented before the subpoena was ordered. The instant situation is unlike *Mancusi*, where no review by a judge was involved.

Defendant further contends that the information from the CS in the motion for the subpoena should not be considered in determining probable cause, because the motion failed to provide a basis for the reliability of the informant. He further argues that if

the information from the CS were excised, the motion fails to provide probable cause.

The CS, identified at the Motion to Suppress hearing as Leroy Shorts, recalled seeing defendant around midnight "a night or two" after Mebruer's disappearance. During that meeting, defendant had a handgun in his truck and told Shorts that Zachary police were harassing him about a missing woman from Zachary. The next night, Shorts saw a television news report on Ms. Mebruer's disappearance and assumed that the defendant was talking about her.

However, the motion only indicates that the conversation occurred a "night or two" after the abduction and does not give a specific date. The testimony at the hearing does not clarify the exact date or the exact time that Zachary officers visited the defendant at his home on April 20 or when Shorts had the conversation with the defendant. A "night or two" could have put the conversation with Shorts after the Zachary officers talked with the defendant. Thus, the CS's information was helpful but not essential in establishing grounds for the issuance of the subpoena.

We note, however, that the motion submitted to Judge Ware was not under oath or affirmation as required by the Fourth Amendment, and we respectfully disagree with the trial court that the state's use of an LSA-C.Cr.P. art. 66 subpoena duces

tecum to acquire a DNA sample from the defendant was the equivalent of obtaining a search warrant.

Search warrants are authorized under the Fourth Amendment of the U.S. Constitution only upon a showing of probable cause "supported by Oath or affirmation" and particularly describing the place to be searched and the persons or things to be seized. Louisiana Code of Criminal Procedure article 162 thus provides, "A search warrant may issue only upon probable cause established to the satisfaction of the judge, by the affidavit of a credible person, reciting facts establishing the cause for issuance of the warrant." In contrast, an LSA-C.Cr.P. art. 66 subpoena is issued upon the *motion* of the attorney general or district attorney; no sworn statement is required.[4] The information presented to obtain the court order in this case was not supported by oath or affirmation. Thus the requirements for a warrant were not met.

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[4] Although not applicable to the instant proceeding, we note Article 163.1 was added to the Louisiana Code of Criminal Procedure by 2005 La. Acts, No. 38, § 1, and provides:

A. A judge may issue a search warrant authorizing the search of a person for bodily samples to obtain deoxyribonucleic acid (DNA) or other bodily samples.

B. The warrant may be executed any place the person is found and shall be directed to any peace officer who shall obtain and distribute the bodily samples as directed in the warrant.

C. A warrant authorizing the search of a person for bodily samples remains in effect for one hundred eighty days after its issuance.

Because the validity of the use of an LSA-C.Cr.P. art. 66 subpoena duces tecum to acquire a DNA sample appears to be a case of first impression in Louisiana, we adopt the rationale set forth in *In re Shabazz*, 200 F. Supp. 2d 578, 581 (D.S.C. 2002). Although *Shabazz* involved a subpoena duces tecum issued by a grand jury, we find the reasoning employed by that court in finding the subpoena a valid means of obtaining a saliva sample equally applicable to an LSA-C.Cr.P. art. 66 subpoena duces tecum authorized by a trial court judge. In both instances an intervening authority (either a grand jury or a trial judge) passes on the reasonableness of the individualized suspicion that the subject of the subpoena has been involved in the alleged crime, thereby reducing the possibility of prosecutorial abuse.

The obtaining of physical evidence from a person involves a potential Fourth Amendment violation at two different levels-the "seizure" of the "person" necessary to bring him into contact with government agents and the subsequent search for and seizure of the evidence. It is well-established that "a physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable." *In re Shabazz,* 200 F. Supp. 2d at 581, citing *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (drug and alcohol testing of railroad employees), *Schmerber v. California,* 384 U.S. 757 (1966) (blood test for alcohol), and *Winston v. Lee,* 470 U.S. 753 (1985) (order to compel surgical operation to remove a

bullet). However, what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection; accordingly, subpoenas compelling voice samples, handwriting samples, fingerprints, and hair samples are not "searches" and therefore do not implicate the Fourth Amendment. *Id.*, citing *U.S. v. Dionisio,* 410 U.S. 1 (1973), *U.S. v. Mara,* 410 U.S. 19 (1973), *Davis v. Mississippi,* 394 U.S. 721 (1969), and *In re Grand Jury Proceedings (Mills),* 686 F.2d 135, 139 (3rd Cir. 1982), *cert. denied,* 459 U.S. 1020 (1982). In contrast, acquiring scrapings below a defendant's fingernails, breathalyzer tests, and urine samples are "searches" within the meaning of the Fourth Amendment, as held in *Cupp v. Murphy,* 412 U.S. 291 (1973), and *Skinner,* 489 U.S. at 613-14. *See In re Shabazz,* 200 F. Supp. 2d at 582.

Nevertheless, as pointed out by the *Shabazz* court, the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable. Thus, under certain circumstances, searches and seizures may be permissible under the Fourth Amendment "based on suspicions that, although 'reasonable,' do not rise to the level of probable cause." *In re Shabazz,* 200 F. Supp. 2d at 583, citing *New Jersey v. T.L.O,* 469 U.S. 325, 341 (1985), and *Terry v. Ohio,* 392 U.S. 1 (1968). The *Shabazz* court reasoned that probable cause need not be a prerequisite for the issuance of a grand jury subpoena ordering a DNA saliva test because the very purpose of requesting the information is to ascertain whether probable cause exists.

The *Shabazz* court concluded that the privacy concerns that led the Supreme Court to require probable cause in other cases are not as pronounced with a saliva swab because it is not as intrusive as a blood test or a surgical bullet-removal procedure. Although the saliva swab involves a slight invasion of a person's bodily integrity, it is not a "surgical procedure" and therefore does not fall within *Schmerber*'s threshold requirement of probable cause, so no showing of probable cause is needed before the issuance of a subpoena duces tecum requiring a saliva sample. *In re Shabazz*, 200 F. Supp. 2d at 584.

The purpose of the saliva sample is plainly to advance the law enforcement objective of determining whether a suspect was involved in illegal physical contact with a victim. Therefore, although a showing of probable cause is not necessary, a subpoena duces tecum requiring a saliva swab must be based on reasonable individualized suspicion that a suspect was engaged in criminal wrongdoing. *In re Shabazz*, 200 F. Supp. 2d at 584-85.

Another consideration is whether the "means and procedures employed" in taking the saliva sample were in themselves reasonable under the Fourth Amendment. To determine the reasonableness of procedures to obtain physical evidence, the "extent to which the procedure may threaten the safety or health of the individual" and

the "extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity" should be "[w]eighed against . . . the community's interest in fairly and accurately determining guilt or innocence." A balancing of these factors in the *Shabazz* case led the court to conclude that the procedure used to obtain the saliva swab was plainly "reasonable" under the Fourth Amendment, because there was no evidence that the saliva swab presented any safety or health risk to the suspect, and secondly, because saliva sampling is a relatively minor intrusion into a suspect's interest in personal privacy and bodily integrity (the sample is obtained by simply swabbing the inside of the mouth and does not involve any risk of pain or embarrassment). The *Shabazz* court further reasoned that on the public interest side of the equation, the government has a clear interest in obtaining DNA as highly probative evidence of identifying, *or eliminating,* a suspect. Further, a saliva swab is much less intrusive than the blood sample upheld by the Supreme Court in *Schmerber.* And it is easily distinguishable from the surgical procedure at issue in *Winston*, which was potentially dangerous and was of uncertain evidentiary value. Thus, the means and procedures used to obtain the saliva sample in *Shabazz* were found to be "reasonable" under the Fourth Amendment. *In re Shabazz,* 200 F. Supp. 2d at 585.[5]

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[5] Other decisions are in accord with *Shabazz*, upholding use of a subpoena to obtain DNA evidence collected via a saliva sample and/or buccal swab following a reasonableness review. *See U.S. v. Garcia-Ortiz,* 2005 WL 3533322 (D.P.R.12/23/05);

In the instant case, as previously stated, the subpoena duces tecum was sought in conjunction with the investigation of the murders of two Zachary women. In the motion prepared by the Attorney General's Office, seeking a subpoena duces tecum for the production of a DNA specimen from the defendant, the facts and circumstances of the kidnapping and/or murders of Randi Mebruer and Connie Warner were set forth. The motion further stated that the defendant had "previously been observed and later subsequently arrested by [Zachary Police Department] officers as a Peeping Tom in the Oak Shadows Subdivision where Mebruer and Warner resided." Immediately following the disappearance of Ms. Mebruer, the motion states that the defendant and his then-girlfriend were interviewed, and that the interview revealed that the defendant had driven past Ms. Mebruer's subdivision during the time that she was alleged to have been murdered. The motion further stated that defendant was considered by law enforcement as a suspect in that murder as well as in connection with the Baton Rouge area serial killer murders.

The defendant's criminal history was also detailed in the motion and included: a 1988

People v. Watson, 825 N.E.2d 257 (Ill. 2005), *cert. denied*, 546 U.S. 1139 (2006); *U.S. v. Swanson*, 155 F. Supp. 2d 992 (C.D. Ill. 2001); *In re Nontestimonial Identification Order Directed to R.H.*, 762 A.2d 1239 (Vt. 2000); *In re Grand Jury Proceedings Involving Vickers*, 38 F. Supp. 2d 159 (D.N.H. 1998).

conviction for attempted unauthorized entry of an inhabited dwelling in St. Francisville; a 1993 conviction of simple burglary of an inhabited dwelling in Zachary; a 1996 plea of nolo contendere to charges of Peeping Tom and resisting arrest in Lake Charles; a 1998 conviction on two counts of Peeping Tom and resisting arrest in Zachary; a 1999 conviction of stalking; and a 2000 conviction of aggravated flight in St. Francisville following an altercation in a bar with his girlfriend and law enforcement, while on probation from a prior conviction. It was also stated in the motion that defendant was not incarcerated at the time that any of the following crimes were committed: the 1992 murder of Connie Warner; the 1998 disappearance of Randi Mebruer; nor the 2001 murder of Gina Wilson Green, the 2002 murder of Charlotte Murray Pace, the 2002 murder of Pam Kinamore, the 2002 murder of Trineisha Dene Colomb, or the 2003 murder of Carrie Yoder, whose murders were linked to a serial killer by DNA profiling. Further, the motion presented facts provided by a confidential informant, who indicated that he had accompanied the defendant to his St. Francisville house within one or two days of the disappearance of Ms. Mebruer, that defendant had complained that Zachary police officers were "harassing" him over a missing woman, and that defendant had armed himself with a revolver.

Based on the facts stated in the motion for issuance of the subpoena duces tecum, we find that there was reasonable and sufficiently individualized

suspicion that the defendant may have been involved in the Zachary crimes involving Ms. Warner and Ms. Mebruer to justify the issuance of the subpoena duces tecum. Whether or not the facts presented in the motion could also have sustained a finding of probable cause is irrelevant; the very purpose of the subpoena is to collect additional evidence sufficient to support probable cause, or to rule the defendant out as a suspect.

We further find that the means and procedures employed in obtaining the sample were not in themselves unreasonable. After obtaining the court order from the 20th Judicial District Court judge, investigator Danny Mixon, along with several other law enforcement officers, went to the defendant's residence and presented him with the subpoena. According to Mr. Mixon, the defendant did not object to the DNA testing. Mixon indicated that he accompanied defendant into his living room, where defendant sat down. Mixon then swabbed both the left and right sides of defendant's mouth. The defendant was not taken into custody at that time.

Based on the facts and circumstances presented in this case, we find no merit in defendant's challenge to the issuance and execution of the subpoena duces tecum ordering DNA sampling.[6]

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[6] Another factor we consider is that grand jury proceedings are conducted in secrecy, not only to facilitate investigations, but to protect innocent persons. Code of Criminal Procedure article 66 seems to imply production pursuant to a subpoena duces tecum "at a time and place designated in the order" for the person

Accordingly, the trial court did not err in denying the Motion to Suppress the DNA evidence.

OTHER CRIMES EVIDENCE

In assignment of error number three, defendant contends that the trial court erred in permitting evidence of other crimes, wrongs, or acts to be introduced at trial.

The state filed a notice of intent to use evidence of other crimes, wrongs, and acts pursuant to LSA-C.E. art. 404(B) and *State v. Prieur,* 277 So.2d 126 (La. 1973), to show "motive, opportunity, intent, preparation, plan and system, knowledge, and absence of mistake or accident" at trial. The written notice specifically refers to evidence of the killing of Trineisha Colomb on November 21, 2002 and the attempted rape and attempted murder of D.A. on July 9, 2002. The notice further refers to defendant's convictions for attempted unauthorized entry of an inhabited dwelling, simple burglary of an inhabited dwelling, and stalking, and arrests for aggravated burglary and "Peeping Tom."

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involved to appear. Presumably the subject of the subpoena would thus have an opportunity to obtain counsel and attempt to quash or contest the subpoena, or to seek a protective order. However, the order prepared in the instant case provided for the DNA sample to be provided "instanter." Fortunately, it also provided for the results to be sealed.

Evidence concerning the crimes against Ms. Colomb and D.A. was presented at a *Prieur* hearing and at trial. Lt. Joseph Arthur Boyd, an investigator in the St. Martin Parish Sheriff's Office, testified at the hearing about the attempted rape and attempted murder of D.A. While cooking lunch, D.A. heard a knock at the front door of her mobile home. She opened the door and saw a man, later identified as the defendant, standing outside. He indicated that he was looking for a family named Montgomery and asked if she knew them. D.A. replied that she did not, and the defendant asked to use her telephone and telephone book. D.A. took the items to the defendant on her porch and closed the door. She returned to the porch after the defendant used the telephone. He asked if her husband knew the family. When D.A. replied that her husband was not at home and that he did not know the family, defendant produced a knife, forced D.A. into her home, and demanded that she lead him to the bedroom. D.A. responded that they could stay in the living room. Defendant began choking the woman. He demanded that she remove her underwear and that she lie on the floor. D.A. complied and the defendant, who had removed his shorts and underwear, attempted to have intercourse, but was unable to obtain an erection. The defendant then started beating D.A. on her head and face. He also tried to strangle her with a telephone cord. When the defendant heard D.A.'s son drive up, he fled through the back door, stomping on the woman's stomach. D.A.'s son saw the defendant's vehicle and assumed it belonged to someone visiting his mother. Once inside, the son

discovered his mother was injured and bleeding; the son ran outside and attempted to follow defendant's vehicle with his own vehicle, but the assailant was able to flee and the woman's son returned home to help his mother.

Detective Boyd testified that he and Lafayette Parish Sheriff's Office Detective Sonny Stutes began comparing information from D.A.'s case and that of Trineisha Dené Colomb, a serial killer victim. DNA found on Ms. Colomb's body matched that of the perpetrator in the serial killer cases in Baton Rouge. Detective Boyd stated that he was aware Ms. Colomb was the first African-American female victim linked to the serial killer and that he knew that D.A. was an African-American female. Detective Boyd asked the crime lab to retest the dress that D.A. was wearing at the time of her assault to look specifically for "contact DNA." D.A. had reported that her attacker had been sweating profusely. A partial profile of the DNA from perspiration on the dress indicated that the unknown serial killer could not be excluded as the source of the DNA found on D.A.'s dress.

With D.A.'s assistance, a computerized composite drawing of D.A.'s attacker was completed. Detective Boyd testified that the drawing resembled the defendant. Subsequently, Boyd had a meeting with the Serial Killer Task Force and a decision was made to release the drawing to the public. As a result, law enforcement officers received tips that led to the

eventual arrest of the defendant for the murder of Geralyn DeSoto.[7]

Carolyn Booker, qualified as an expert in the field of forensic DNA analysis, also testified at the *Prieur* hearing. She performed DNA testing at the Acadiana Crime Lab. She testified D.A.'s dress was negative for semen, but had stains containing DNA. Booker indicated that the defendant, an African-American, could not be excluded as a contributor of the DNA, but that 99% of the African-American population would be excluded. At trial, Ms. Booker acknowledged that D.A.'s husband also could not be excluded as a minor contributor of the DNA found on her dress.

Ms. Booker also conducted analysis of DNA from a vaginal swab of Ms. Colomb. The profile of the sperm cells from the swab matched defendant's known profile. She concluded with reasonable scientific certainty that defendant was the source of the male DNA and the sperm taken from Ms. Colomb's body. She testified that the probability of selecting a random individual with the same profile would be one in thirty trillion.

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[7] The chronology appears as follows: the composite drawing when released to the public led to interest in defendant. He was then identified through DNA as the common perpetrator of the five known serial murders. D.A. identified defendant in a photographic line-up and he was arrested for the attack on her. Subsequent DNA analysis linked defendant to Geralyn DeSoto.

Gina Pineda was qualified as an expert in molecular biology and forensic DNA analysis and testified at the *Prieur* hearing and at trial. She was employed by Reliagene Lab, a private lab that performed Y-STR testing on fingernail clippings and a vaginal swab from Ms. DeSoto, the victim in the instant matter, and a vaginal swab from Ms. Colomb. This type of testing could not be done at the state crime lab.

Ms. Pineda explained that there are two types of DNA. The Y-STR test is conducted for DNA that is only on the male Y chromosome. Thus, the test attempts to find male DNA and was performed on the fingernail scrapings from Ms. DeSoto. This was done because the sample taken from Ms. DeSoto's fingernails was of poor quality and was "overwhelmed" with her female DNA. The DNA extracted from Ms. DeSoto's fingernail scrapings indicated a male contributor and revealed that defendant was a potential contributor of the DNA, while excluding 99.8% of the African-American population as potential donors. This figure was determined by using a random data base of 1605 individuals of African-American descent. Ms. Pineda acknowledged on cross-examination that when the Louisiana State Police Crime Lab tested the DNA found on Ms. DeSoto, a male chromosome was not detected. She further testified that there was more than one male donor of the DNA found under Ms. DeSoto's fingernails and that Ms. DeSoto's husband could not be excluded as a minor donor. Ms. Pineda admitted that paternal relatives of the defendant

could not be excluded as potential donors of the DNA sample taken from Ms. DeSoto. She explained that the Y-STRs are inherited straight from the father, so a man will have the same Y-STR profile as his father, brother, and any individuals related through the paternal line.

The state argued that in order to counter the possibility that a male relative of the defendant actually perpetrated the crime, the Y-STR profile derived from the DNA sample taken from Ms. DeSoto was compared to and found to be consistent with Y-STR testing performed on a DNA sample from the Colomb case, where defendant was established with reasonable scientific certainty as the perpetrator, and the probability of selecting a random individual with the same profile was stated as one in thirty trillion. The match of male DNA profiles from the Colomb and DeSoto cases thus excluded the possibility of male relatives of the defendant as possible perpetrators of the DeSoto crime.

In addition to evidence from the D.A. and Colomb cases, "other acts" that the state sought to introduce were incidents that occurred on February 19, 1997; July 31, 1997; and August 19, 1999. Zachary Police Department Sergeant Roderick Ennis testified at the *Prieur* hearing and at trial that on February 19, 1997, at about 9:00 p.m., he was patrolling the Oak Shadows subdivision when he saw the defendant. Ennis, who lived in the subdivision, knew that the defendant did not live there. He stopped him and

asked for his identification. Defendant stated he had left it in his vehicle, which had broken down. Defendant indicated that he was going to his girlfriend's house to use the telephone, but did not know the girlfriend's name or where she lived. Upon frisking the defendant, Ennis found a knife in his front pocket. He noted that the defendant was wearing brown, western-type boots with a thick heel and had a pair of work gloves. When Ennis dropped the defendant off at his vehicle, Ennis noticed that it was a new truck that started immediately when defendant turned on the ignition. Sergeant Ennis testified that he did not arrest the defendant that night and that defendant did not commit a crime, but because there had been a rash of "Peeping Tom" incidents in the area and because both Connie Warner and Randi Mebruer had lived in the subdivision, he prepared a report.

Zachary Police Department Lt. David McDavid testified at the hearing that on July 31, 1997, he investigated two "Peeping Tom" complaints in the Oak Shadows subdivision in Zachary. The defendant was arrested in the area for these incidents, and Lt. McDavid later learned that the defendant had been seen in the same area in February of that year. Defendant was subsequently convicted of the "Peeping Tom" offenses.

On August 19, 1999, St. Francisville Police Department Officer Archie Lee took statements from three women who lived in the St. Francisville Square Apartments. Each of the women stated that the

defendant had been stalking them in the apartment complex, and each identified defendant's picture in a photographic lineup. One of the women, Collette Walker Dwyer, indicated that the defendant had entered her apartment on two occasions without her consent. The defendant was arrested later that day and subsequently pled guilty to "Peeping Tom" offenses. At trial, Ms. Dwyer gave a more detailed description of her encounters with the defendant. During one of the incidents, the defendant walked up as she was unlocking her apartment door and walked with her into her apartment. He got himself something to drink, sat down, proceeded to question Ms. Dwyer and repeatedly asked her to go out with him. He also stated that he could rape her if he wanted. He only left when she walked out of the apartment and he followed her.

After the *Prieur* hearing, the trial court ruled it would allow the following other acts evidence to be introduced at trial: the murder of Colomb, the attempted rape and attempted murder of D.A., the February 19, 1997 stop of defendant while in Warner and Mebruer's subdivision including the discovery of a knife on defendant's person, the July 31, 1997 arrest in the same subdivision for two acts of "Peeping Tom", and the 1999 incidents when defendant approached a St. Francisville Square Apartments resident and a few days later was seen again at the same apartment complex and was convicted of "Peeping Tom" offenses. The trial judge concluded that each of the crimes or acts had been proven by clear and convincing evidence and could be

used at trial to show knowledge, plan, and preparation and that the probative value of the evidence outweighed the prejudicial effect.

Defendant sought review of the trial court's ruling, and this court denied the writ. The supreme court denied defendant's writ seeking review. *State v. Lee,* 2004-1205 (La. App. 1 Cir. 7/16/04) (unpublished), *writ denied,* 877 So.2d 997 (La. 2004).[8]

Article 404(B)(1) of the Code of Evidence provides:

> Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes, or when it relates to conduct that constitutes an integral part of the act or

[8] In the writ action by this court, Judge McDonald concurred in part and dissented in part.

transaction that is the subject of the present proceeding.

Generally, evidence of other crimes committed by the defendant is inadmissible due to the substantial risk of grave prejudice to the defendant. To admit "other crimes" evidence, the state must establish that there is an independent and relevant reason for doing so, i.e., to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or that it relates to conduct that constitutes an integral part of the act. The Louisiana Supreme Court has also held admissible evidence of other crimes exhibiting almost identical modus operandi or system, committed in close proximity in time and place. Evidence of other crimes, however, is not admissible simply to prove the bad character of the accused. Furthermore, the other crimes evidence must tend to prove a material fact genuinely at issue, and the probative value of the extraneous crimes evidence must outweigh its prejudicial effect. *State v. Millien,* 845 So.2d 506, 513-14 (La. 2003), citing *State v. Tilley,* 767 So.2d 6, 22 (La. App. 2000), *cert. denied,* 532 U.S. 959 (2001).

The procedure to be used when the state intends to offer evidence of other criminal offenses was formerly controlled by *State v. Prieur.* Prior to its repeal by 1995 La. Acts, No. 1300, § 2, LSA-C.E. art. 1103 provided that the notice requirements and clear and convincing evidence standard of *Prieur* and its progeny were not overruled by the Code of Evidence. *Prieur* dealt with LSA-R.S. 15:445 and LSA-R.S.

15:446, now-repealed statutes, which addressed the admissibility of other crimes evidence. Under *Prieur*, the state was required to give a defendant notice, both that evidence of other crimes would be offered against him, and upon which exception to the general exclusionary rule the state intended to rely. Additionally, the state had to prove by clear and convincing evidence that the defendant committed the other crimes. *Millien*, 845 So.2d at 514.

1994 La. Acts, 3d Ex. Sess., No. 51 added LSA-C.E. art. 1104 and amended LSA-C.E. art. 404(B). Article 1104 provides that the burden of proof in pretrial *Prieur* hearings "shall be identical to the burden of proof required by Federal Rules of Evidence Article IV, Rule 404." The amendment to LSA-C.E. art. 404(B) inserted the language "provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes" into the article.

The burden of proof required by Federal Rules of Evidence Article IV, Rule 404, is satisfied upon a showing of sufficient evidence to support a finding by the jury that the defendant committed the other crime, wrong, or act. The Louisiana Supreme Court has yet to address the issue of the burden of proof required for the admission of other crimes evidence in light of the repeal of LSA-C.E. art. 1103 and the addition of LSA-C.E. art. 1104. However, numerous Louisiana appellate courts, including this court, have

held that the burden of proof is now less than "clear and convincing." *Millien*, 845 So.2d at 514.

If the prosecution is using other crimes evidence to show "identity," the law requires that the facts of the cases be so "peculiarly distinctive" that one must logically say they are the work of the same person, but if the state wishes to use such evidence to show defendant' s "intent," the standard is lower, and the state must only show that the crimes are similar. *State v. Langley,* 680 So.2d 717, 721 (La. App. 1996), *writ denied,* 688 So.2d 498 (La. 1997). Where testimony shows that factual circumstances of prior acts and the crime charged are virtually identical, evidence of other crimes is corroborative of the victim's testimony and establishes a system or plan. *State v. Lewis,* 687 So.2d 1056, 1059 (La. App. 1997), *writ denied,* 696 So.2d 1004 (La. 1997). Where identity is genuinely at issue, system evidence has relevance independent of a defendant's criminal propensity and should be admitted if it meets the other tests of admissibility. *State v. Ester*, 436 So.2d 543, 546 (La. 1983).

In *State v. Bell,* the Louisiana Supreme Court found that while there were some similarities between the two crimes, the prior crime was not "so distinctively similar to the charged crime (especially in time, place and manner of commission) that one may reasonably infer that the same person was the perpetrator." Bell was charged with armed robbery and the state sought to introduce evidence of another robbery. The supreme court found that there were

many differences between the two robberies, including the race of the perpetrators and the type of weapons used, and that the identity exception to inadmissibility must be limited to cases in which the crimes are genuinely distinctive. The crimes involved robberies of bars at night and occurred within two months of one another in Ascension Parish. The perpetrators in both cases were described as wearing dark hooded sweatshirts or Starter jackets. During both robberies, the perpetrators disengaged the telephone at the scene. The only evidence directly connecting Bell to the crime was the testimony of two co-perpetrators who were charged with participation in the robbery, but had not yet been tried. The supreme court found that the sufficiency of the evidence presented by the co-perpetrators easily would be upheld if the prosecutor had not introduced inadmissible evidence for the purpose of influencing the jury's determination of defendant's guilt and then emphasized in argument the role of that evidence in the guilt determination. The court found that it could not conclude with any confidence that the jury's guilty verdict was surely unattributable to the erroneous admission of evidence of a prior armed robbery committed by defendant, especially since the prosecutor exploited the inadmissible evidence in rebuttal closing argument. The supreme court found that this court concluded correctly that the other crimes evidence was erroneously admitted. A harmless error analysis[9] was conducted, the

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[9] The supreme court concluded that erroneous admission of other crimes evidence is subject to harmless error analysis under the standard set forth in *Chapman v. California,* 386

conviction was reversed, and the case was remanded for a new trial. *State v. Bell,* 776 So.2d 418, 421-23 (La. 2000).

The balancing test of LSA-C.E. art. 403 is conducted if the other crimes evidence is admissible. Article 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time.

In the instant case, defendant argues that the only real issue at trial was the identity of the victim's assailant, and that the facts of the instant offense and the other crimes are not so distinctively similar that they meet the necessary standard to be introduced at trial. As to the other crimes involving Colomb and D.A., defendant argues that the use of the evidence about the DNA test results in those

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U.S. 18 (1967). The *Chapman* standard was later refined in *Sullivan v. Louisiana,* 508 U.S. 275 (1993). The supreme court stated that the inquiry was not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. The court found that when the trial court erroneously allows inadmissible evidence, the prosecutor has a very heavy burden to demonstrate in the appellate court that the error was harmless beyond a reasonable doubt. *State v. Bell,* 776 So.2d at 422-23.

cases allowed the state to introduce those results during the DeSoto trial, and that this evidence highly impacted the jury, as prospective jurors had indicated in voir dire that DNA evidence was infallible. Defendant further argues that the facts presented as to each crime do not show that there were distinctive similarities; rather they were commonplace. Additionally, defendant contends that the other crimes evidence was not used for limited purposes as required, but to cast him as the serial killer suspected in numerous Baton Rouge murders. He contends that the state did not use this evidence for the stated purpose to show identity of the perpetrator through system or modus operandi.

The state argues that the Colomb and D.A. cases are similar to the DeSoto case because the defendant's DNA was found on each of the victims. This is a bootstrap argument. DNA evidence is not an "act" and cannot by itself constitute an act similar to the crime charged that would make evidence of that act admissible in the trial of the crime charged. Absent the requisite similarity between the crime charged and the other "acts," evidence of the other acts is not admissible at the trial of the crime charged. DNA evidence alone cannot bootstrap the other act into being "similar." DNA is a type of evidence, not a crime, wrong, or act.

Analysis of the three crimes at issue shows that while the DeSoto case and the D.A. case are distinctively similar, the Colomb case is not. While all three victims were in a violent bloody struggle

and beaten in the head and face, scenarios unfortunately common to many murder and rape cases, here the similarities end. Ms. Colomb was raped, Mrs. DeSoto and D.A. were not. A knife was used in the DeSoto and D.A. crimes, but not in the Colomb case. Cordless phones were missing in DeSoto and D.A., but not Colomb. DeSoto and D.A. were attacked in their homes at midday, Colomb's body was found far from her house. There was evidence of a "stomp" in the DeSoto and D.A. cases, but not in Colomb. Telephone calls were placed from the homes of DeSoto and D.A., but not from that of Colomb.

We find that the facts of the instant case, when compared to the facts of the case of D.A., are so peculiarly distinctive that the evidence of the D.A. case, including DNA evidence, was properly admitted at trial. We cannot reach the same conclusion with respect to the evidence in the Colomb case. The cases are not distinctively similar. Nor are we persuaded by the state's argument that the Colomb evidence was admissible to counter the possibility that one of the defendant's male relatives perpetrated the DeSoto crime. This end could have been accomplished by testing and comparing male DNA from a known sample of the defendant rather than comparing a sample of the defendant taken from the body of Ms. Colomb. Furthermore, D.A. identified defendant at trial as her attacker.

Likewise, the various Peeping Tom, stalking, and burglary/unauthorized entry crimes, wrongs, and

acts should not have been admitted. While these acts are perhaps similar to each other, and tend to paint the defendant as a sexual predator, they are not similar to the DeSoto crime. This evidence was prejudicial character evidence meant to be excluded by *Prieur* and Article 404(B)(1) of the Code of Evidence.

The erroneous admission of other crimes, wrongs, or acts evidence is a trial error subject to harmless error analysis on appeal. *State v. Johnson,* 664 So.2d 94, 101 (La. 1995). The test for determining whether an error is harmless is whether the verdict actually rendered in this case "was surely unattributable to the error." *Sullivan v. Louisiana,* 508 U.S. 275, 279, (1993); *Johnson,* 664 So.2d at 100.

In the case at hand, we find that the other acts evidence erroneously admitted was harmless and that the defendant's conviction was surely unattributable to the error. The DNA evidence in the instant case showed a high probability that the defendant was the perpetrator, excluding as possible DNA contributors 99.8% of the African-American population, although not excluding defendant's paternal relatives or the victim's husband as a minor contributor. Furthermore, the DNA evidence from the D.A. case excluded 99.9% of the African-American population, but the defendant and D.A.'s husband were not excluded. However, D.A. identified the defendant as her attacker. Other physical evidence also linked the defendant to the instant crime, including his proximity, a boot print,

the knife wounds, and the telephone call from the victim's phone to defendant's former place of employment.

SUFFICIENCY OF THE EVIDENCE

In assignment of error number four, defendant argues that without the other crimes evidence, the remainder of the evidence introduced was insufficient to support the conviction. He contends that the remaining evidence (DNA analysis indicating a male member of his family was the perpetrator, a boot print at the scene of the murder possibly made by defendant's boot, that he traveled a route on the day of the murder that brought him within 200 yards of the victim's home, and that defendant carried a knife consistent with the type of knife used to kill the victim) is insufficient to prove he killed the victim.

The state argues that the evidence, particularly the DNA evidence found under the victim's fingernails, places defendant at the murder scene and indicates he was the killer.

The standard of review for the sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the state proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979). *See also* LSA-C.Cr.P.

art. 821; *State v. Wright,* 730 So.2d 485, 486 (La. App. 1999), *writ denied,* 748 So.2d 1157 (La. 1999), *writ denied,* 773 So.2d 732 (La. 2000).

When analyzing circumstantial evidence, LSA-R.S. 15:438 provides: "[A]ssuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." This statutory test is not a purely separate one from the *Jackson* constitutional sufficiency standard. Ultimately, all evidence, both direct and circumstantial, must be sufficient under *Jackson* to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt. *State v. Shanks,* 715 So.2d 157, 159 (La. App. 1998). The reviewing court is required to evaluate the circumstantial evidence in the light most favorable to the prosecution and determine if any alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt. *State v. Fisher,* 628 So.2d 1136, 1141 (La. App. 1993), *writs denied,* 637 So.2d 474 and 476 (La. 1994). As the trier of fact, the jury was free to accept or reject, in whole or in part, the testimony of any witness. *State v. Johnson,* 734 So.2d 800, 805 (La. App. 1999), *writ denied,* 748 So.2d 439 (La. 1999).

There were no eyewitnesses to directly connect defendant with the murder, and the evidence presented at trial was circumstantial. The evidence showed that a boot print at the scene of the murder matched a print made from one of defendant's boots,

and that defendant carried on his person a knife consistent with the type of knife that could have made the wounds the victim received. The state also presented evidence showing it was possible that on the day of the murder the defendant, on his way to get a paycheck from his former employer, traveled a route within 200 yards of the victim's home, and that a call placed from the victim's telephone within the estimated time of the murder was made to a number assigned to an area in a plant where defendant had previously worked. Other evidence included the results of analysis of DNA obtained from the victim's fingernails that could not exclude defendant and his paternal relatives as a source, but could exclude 99.8% of the African-American population. Additional evidence showed that DNA test results obtained from the crimes involving D.A. indicated the defendant could not be excluded as the perpetrator in the D.A. case. Additionally, D.A. provided a police sketch of her attacker to law enforcement, and it resembled the defendant. She identified him in a photographic lineup, and she identified him as her attacker at trial.

Therefore, after a thorough review of the record and the evidence contained therein, we are convinced that a rational trier of fact could have concluded beyond a reasonable doubt that the evidence was sufficient to exclude every reasonable hypothesis of innocence, to negate any reasonable probability of misidentification, and to prove that defendant was the perpetrator.

This assignment of error lacks merit.

CHANGE OF VENUE

In assignment of error number five, defendant argues that the trial court erred in denying his motion to change venue, which was based upon the failure to obtain a fair and impartial jury due to the effect of pretrial publicity on the venire. Specifically, defendant argues that misinformation about the crime and extensive media coverage saturated the community and inflamed feelings against him. He contends that every one of the prospective jurors questioned, including the seated jurors, was familiar with the facts of the case and his reputation as the suspected serial killer.

The state responds that the exposure to media coverage is not the criteria for finding the venire was tainted. Rather, it is the impact of the exposure that is reviewed to determine if the community was prejudiced and an impartial and fair trial could not be held in the place of original venue.

The record shows the trial court deferred its ruling on the motion for change of venue until after the venire had been questioned about its knowledge of the case. Several times during voir dire defense counsel reiterated the motion, which the trial judge denied. Near the end of voir dire, defense counsel reurged his motion to change venue. The judge denied the motion and stated, in pertinent part:

> [T]o expect people not to know anything about it [the case] would be absurd. I don't think there's a square inch of ground in this state where people have not heard of this case, I don't believe it. I just don't believe it.
>
> The ultimate issue for determination and what Mr. Lee is entitled to is a right to a trial by fair and impartial jurors, that's what he's entitled to, that's what the law grants him.

A defendant is guaranteed an impartial jury and a fair trial. LSA-Const. art. I, § 16; *State v. Brown*, 496 So.2d 261, 263 (La. 1986); *State v. Bell,* 315 So.2d 307, 309 (La. 1975). To accomplish this end, the law provides for a change of venue when a defendant establishes he will be unable to obtain an impartial jury or a fair trial at the place of original venue. *State v. Bell,* 315 So.2d at 309.

Louisiana Code of Criminal Procedure article 622 provides, in pertinent part:

> A change of venue shall be granted when the applicant proves that by reason of prejudice existing in the public mind or because of undue influence, or that for any other reason, a fair and impartial trial cannot be obtained in the parish where the prosecution is pending.

In deciding whether to grant a change of venue, the trial court shall consider whether the prejudice, the influence, or the other reasons are such that they will affect the answers of jurors on the voir dire examination or the testimony of witnesses at the trial. *State v. Hoffman,* 768 So.2d 542, 552 (La. 2000), *cert. denied,* 531 U.S. 946 (2000).

In unusual circumstances, prejudice against the defendant may be presumed. Unfairness of a constitutional magnitude will be presumed in the presence of a trial atmosphere that is utterly corrupted by press coverage or that is entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of the mob. *See State v. David,* 425 So.2d 1241, 1246 (La. 1983). Otherwise, the defendant bears the burden of showing actual prejudice. *State v. Vaccaro,* 411 So.2d 415, 423-24 (La. 1982).

Whether a defendant has made the requisite showing of actual prejudice is a question addressed to the trial court's sound discretion, which will not be disturbed on appeal absent an affirmative showing of error and abuse of discretion. Several factors are pertinent in determining whether actual prejudice exists, rendering a change in venue necessary: (1) the nature of pretrial publicity and the degree to which it has circulated in the community, (2) the connection of government officials with the release of the publicity, (3) the length of time between the publicity and the trial, (4) the severity and notoriety

of the offense, (5) the area from which the jury is drawn, (6) other events occurring in the community which either affect or reflect the attitude of the community or individual jurors toward the defendant, and (7) any factors likely to affect the candor and veracity of the prospective jurors on voir dire. *State v. Manning,* 885 So.2d 1044, 1061-62 (La. 2004), *cert denied,* 544 U.S. 967 (2005).

In the present case, a review of these factors demonstrates the trial court did not abuse its discretion when it denied the motion. As to the factor of pretrial publicity and the degree it circulated in the community, defendant submitted, in the form of a proffer, approximately six local newspaper articles published a few days before and during voir dire. As acknowledged by the trial judge in one of his rulings on the motion to change venue, the voir dire revealed that almost all the prospective jurors examined responded they had some exposure to the instant case or the serial killer cases.

As noted earlier, defendant is not entitled to a jury entirely ignorant of his case and cannot prevail merely by showing a general level of public awareness about the crime. In several cases, high exposure to publicity before the trial did not result in reversible error for the failure to change venue. In *State v. Frank,* 803 So.2d 1, 16-17 (La. 2001), 110 out of 113 venire members (97%) had been exposed to some publicity surrounding the case, and 89% of the prospective jurors indicated they had been exposed to information about the case on more than one

occasion or from multiple sources. *See also Hoffman*, 768 So.2d at 555 (72 out of 90 prospective jurors (80%) had awareness of the case before trial); *State v. Connolly,* 700 So.2d 810, 815 (La. 1997) (although 120 out of 139 potential jurors (86.33%) possessed some knowledge about the crime, most had only a vague recollection of the surrounding facts).

As to the connection of government officials with the release of the publicity, some of the newspaper articles during voir dire included comments made by the trial judge likening the use of juror challenges to a game of chess. Most of the pretrial articles do not include comments by government officials, although one article includes a discussion of the evidence by the prosecutors. In the newspaper on that same day are extensive articles about the victim and about the defendant, his upbringing, his past criminal history, and facts about the other alleged serial killer cases.

Regarding the factor of the length of time between the publicity and the trial, the newspaper articles proffered by defendant indicate that the news coverage was extensive just prior to the start of voir dire and was ongoing during the trial. Although not documented by defendant, other areas in the record indicate there was extensive publicity during the investigation of the serial killer murders, at the time defendant was arrested for the murders, and at the time the victim in this case was alleged to be one of the victims of the serial killer. However, during voir dire, the trial judge repeatedly admonished the venire to avoid media coverage of the case. There is

nothing in the record to indicate that any of the prospective jurors did not abide by the trial court's admonishment. Without doubt the severity and notoriety of the offense and the other crimes to be established at trial were significant and extensive. The victim in the instant offense was alleged to have been one of more than five victims of the same offender. As noted by the trial judge, there was doubt that anyone in the state would not have heard of the serial killer cases.

The area from which the jury was drawn was in West Baton Rouge Parish, where the offense occurred. West Baton Rouge Parish is separated by the Mississippi River from East Baton Rouge Parish, where most of the other alleged serial killer crimes were committed. However, both parishes are within the coverage of the same print and electronic news media.

As shown by the record of the voir dire, many persons in the community were affected by the numerous murders of women by the alleged serial killer. Many people were more cautious during the time the murders were being committed. Some members of the community altered their lifestyles and obtained guns or mace to protect themselves. Among the prospective jurors questioned, the majority did not make significant changes in their lifestyle. However, a number of the venire indicated they became more relaxed and less fearful after the defendant was in custody and identified by law enforcement officials as the serial killer.

It does not appear that there were other factors that affected the candor and veracity of the prospective jurors on voir dire. Instead, as noted by the trial judge, the prospective jurors appeared to be quite truthful when questioned. Some prospective jurors indicated they had familiarity with the case or had heard opinions about defendant's guilt or innocence from sources other than the media, presumably from discussions with friends or family, but almost all indicated they were able to set aside this information. Although there may have been a sense in the community that the defendant was the killer in the instant case and in the serial killer cases, the record does not indicate that this opinion prevented defendant from receiving a fair trial. Most of the prospective jurors and all of the seated jurors with an opinion about the defendant's guilt or innocence stated they were able to put aside this opinion and base their verdict only upon the evidence introduced at trial.

Based upon our review of the factors and the record before us, we find no abuse of the trial court's discretion in denying defendant's motion for change of venue.

CHALLENGES FOR CAUSE

In assignment of error number six, the defendant argues that the trial court erred by repeatedly denying his challenges for cause.

An accused in a criminal case is constitutionally entitled to a full and complete voir dire examination and to the exercise of peremptory challenges. LSA-Const. art. I, § 17(A). The purpose of voir dire examination is to determine prospective jurors' qualifications by testing their competency and impartiality and discovering bases for the intelligent exercise of cause and peremptory challenges. *State v. Robertson,* 712 So.2d 8, 25 (La. 1998), *cert. denied,* 525 U.S. 882 (1998).

Louisiana Code of Criminal Procedure article 797 provides for challenges of prospective jurors for cause as follows:

> The state or the defendant may challenge a juror for cause on the ground that:
>
> (1) The juror lacks a qualification required by law;
>
> (2) The juror is not impartial, whatever the cause of his partiality. An opinion or impression as to the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render

an impartial verdict according to the law and the evidence;

(3) The relationship, whether by blood, marriage, employment, friendship, or enmity between the juror and the defendant, the person injured by the offense, the district attorney, or defense counsel, is such that it is reasonable to conclude that it would influence the juror in arriving at a verdict;

(4) The juror will not accept the law as given to him by the court; or

(5) The juror served on the grand jury that found the indictment, or on a petit jury that once tried the defendant for the same or any other offense.

A challenge for cause should be granted, even when a prospective juror declares his ability to remain impartial, if the juror's responses as a whole reveal facts from which bias, prejudice, or inability to render judgment according to law may be reasonably implied. *State v. Martin,* 558 So.2d 654, 658 (La. App. 1990), *writ denied,* 564 So.2d 318 (La. 1990). A trial judge is vested with discretion in ruling on challenges for cause, and only where it appears upon review of the voir dire examination as a whole that the judge's exercise of that discretion has been arbitrary or unreasonable, resulting in prejudice to

the accused, will this court reverse the ruling of the trial judge. *See Martin,* 558 So.2d at 658.

Defendant contends that the trial court erred in denying the challenges for cause as to all the seated jurors, except for Mr. LeBlanc and Mr. Anderson, because each juror was partial, unable to accept the law, or biased due to adverse pretrial publicity. He also contends that prospective jurors Wendy Knapps, Steven Cope, and Patricia Acosta were biased. None of these three were chosen for the jury.

As to defendant's general allegation concerning the seated jurors, without any specific argument or facts related to any one particular juror, the state responds that it is "unable to specifically refute such a baseless allegation." We agree that defendant's assignment of error as to the ten seated jurors lacks specificity. Nevertheless, we have reviewed the entire voir dire, including that of the seated jurors, and find no error.

The defendant does make specific allegations regarding three prospective jurors who were unsuccessfully challenged for cause. Specifically, as to prospective juror Wendy Knapps, the state responds that Ms. Knapps assured the trial court that she could put aside her previously formed opinion on the issue of guilt or innocence and apply the law as given by the court. During voir dire, Ms. Knapps indicated she could be fair and would rely on the evidence in determining her verdict. Later during questioning, Ms. Knapps indicated that she

had seen television news reports about the defendant. Once she learned that defendant was arrested, she stopped being concerned about her safety. Ms. Knapps further stated that, although she had talked to her co-workers about the case, she did not form nor express an opinion about defendant's guilt or innocence.

There is no indication that Ms. Knapps was biased or prejudiced against defendant or that she could not follow the law as given to her by the trial judge. She did not indicate that she had developed an opinion; she merely had been concerned about her safety when hearing news reports of homicides in the general area. Thus, the judge's ruling denying the challenge for cause as to Ms. Knapps was not an abuse of discretion.

Steven Cope's answers to initial voir dire questioning indicated that he could put aside any opinion he may have had and follow the law as explained by the trial judge. Mr. Cope further indicated that he had heard television news reports and read newspaper accounts regarding defendant as far back as one and one-half years before he was called for jury duty. He recalled hearing that defendant's DNA matched that of the killer and that he believed defendant was guilty. Although he initially commented that he would not want to have himself on the jury if he were being tried, Mr. Cope later stated he hoped he could put aside his belief about defendant. Mr. Cope followed up his answers by stating he could put aside any opinion and had

not understood the question at first. The pertinent part of the colloquy during voir dire is as follows:

> Q. At some point did you form an opinion in your mind as to whether you thought he was guilty or innocent?
>
> A. MR. COPE: As I said earlier, yes, that he was guilty.
>
> Q. And when did you form that opinion?
>
> A. MR. COPE: Probably at the beginning of the-whenever it came down that they caught the suspected serial killer, that the DNA matched, and . . .
>
> Q. So at that point you started thinking he was probably guilty?
>
> A. Right, right.
>
> Q. Did anything happen during those, all the time he's been in jail, from whenever you first heard about it, that changed your mind?
>
> A. MR. COPE: Not really.
>
> Q. You've heard nothing to change your opinion?
>
> A. MR. COPE: Not particularly, no, sir.

Q. So you still hold that opinion?

A. MR. COPE: I can put it aside, but yeah, I still hold that opinion.

Q. I understand. You still are going to start with the opinion that Mr. Lee is guilty?

A. MR. COPE: Correct.

Q. So somehow you've got to get rid of that opinion.

A. MR. COPE: Well, I can put it aside.

Q. How are you going to put it aside?

A. MR. COPE: If I was sitting in that chair right now and somebody was accusing me and I know I'm innocent, I would expect them to put it aside.

Q. Well, let me ask you this: knowing what you know in your mind and knowing that today as you sit here you have an opinion that you think he's guilty, let's switch it and you were sitting in that chair and you were accused, would you want someone like you?

A. MR. COPE: No, I wouldn't.

Q. Why not?

A. MR. COPE: Well, hopefully I would have it in the back of my mind that you think you could put everything aside and start off clean—

Q. Good question, hopefully.

A. MR. COPE: Hopefully.

Q. But you're not sure?

A. MR. COPE: I could put it aside, so yes, I would say I want me on the—as a juror.

Q. Okay. First, you said you didn't—

A. MR. COPE: I didn't understand, I understand now.

Q. But you've changed your mind and you would want you?

A. MR. COPE: Right.

Q. What did you do different once you heard about Mr. Lee and these murders?

A. MR. COPE: Do differently as in?

Q. I mean like—

A. MR. COPE: Nothing.

Q. Did you have a fiancee or wife at the time?

A. MR. COPE: It didn't directly involve us as in everyday living. We didn't go out and get a gun or mace or anything like that.

Q. You didn't?

A. MR. COPE: Oh, no, I wasn't worried about that.

Q. Did you check on your fiancee more?

A. MR. COPE: Not particularly.

Q. Not at all?

A. MR. COPE: I think she can handle herself.

Q. Does she carry a gun?

A. MR. COPE: No.

Q. And if she were out at night in the Baton Rouge area?

A. MR. COPE: I would be worried, but—

Q. You were worried then?

A. MR. COPE: I would be worried, yeah. But as any day, even before that, I didn't have my wife or a fiancee then, but you know, my mother, my brother, and my sister or something like that.

Q. And when Mr. Lee was arrested did you feel relieved?

A. MR. COPE: I could say yeah, I felt a little bit more relieved.

After reviewing the answers as a whole, it appears that Mr. Cope indicated that he was able to be an impartial juror and that the trial court did not abuse its discretion in denying defendant's challenge for cause as to Mr. Cope.

Patricia Acosta stated she would have to "see the evidence and weigh it" before rendering a verdict. She further indicated that if defendant exercised his right not to testify, she would not hold that decision against him. Ms. Acosta admitted seeing media coverage on television and seeing pictures of women who were missing and alleged murder victims of the serial killer. However, she did not hear any opinion of defendant's guilt or innocence and she had not formed an opinion herself. She reiterated that she would not allow the media coverage to interfere with her decision and would base her verdict only on the evidence presented at trial. She could be fair and put aside anything heard about the case.

The record shows that Ms. Acosta consistently indicated that she could put aside any information she had received about defendant outside of trial, could follow the law in deciding the case, and could be a fair and impartial juror. The trial court's denial of the challenge for cause as to Ms. Acosta was not error.

This assignment of error lacks merit.[10]

INTRODUCTION OF VIDEOTAPE OF CRIME SCENE

In assignment of error number seven, defendant contends that the trial court erred in allowing the jury to be shown a videotape of the crime scene. He argues the video was gruesome and unnecessary to the state's case because the jury also had still photographs of the crime scene to view. The state responds that the videotape did not unfairly prejudice the defendant. Instead, the videotape depicted the crime scene as it was found, corroborated other evidence, and illustrated facts in the case.

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[10] We note that during jury selection in this case, 6 panels of 14 potential jurors were examined by the court and counsel before the 12-man and 2-alternate jury was empanelled. Of those 84 persons, 17 potential jurors were excused by the trial judge for various disqualifying reasons. Defendant asserted challenges for cause as to almost all of the remaining 67 prospective jurors. The trial judge granted 17 of defendant's challenges for cause and 14 challenges for cause asserted by the state.

Even when the cause of death is not at issue, the state is entitled to the moral force of its evidence and postmortem photographs of murder victims are admissible to prove corpus delicti, to corroborate other evidence establishing cause of death, location, or placement of wounds, as well as to provide positive identification of the victim.

The issue of admissibility of a videotape is similar to the issue of the admissibility of still photographs; a videotape, like a photograph, may be admissible to corroborate other testimony in a case, such as: location of the body, manner of death, specific intent to kill, cause of death, and the number, location, and severity of wounds. *State v. Davis,* 637 So.2d 1012, 1026 (La. 1994), *cert. denied,* 513 U.S. 975 (1994); *State v. Pooler,* 696 So.2d 22, 50 (La. App. 1997), *writ denied,* 703 So.2d 1288 (La. 1997). Photographs that illustrate any fact, shed light upon any fact or issue in the case, or are relevant to describe the person, place, or thing depicted, are generally admissible, provided their probative value outweighs any prejudicial effect. The fact that the photographs are gruesome does not of itself render the photographs inadmissible. Merely because the videotape may be "cumulative" evidence does not render the tape inadmissible. A trial court's ruling on the admissibility of such evidence will be disturbed only if the prejudicial effect of the evidence outweighs its probative value. LSA-C.E. art. 403; *Pooler,* 696 So.2d at 51.

As in *Pooler*, the videotape in this case depicts the scene of the crime as the police officers found it. The tape shows the doorway of the victim's residence, the layout of her trailer including the kitchen/living room where she was confronted, the hall/laundry area leading to the bedroom, and bedroom where the victim's body was found. The videotape also shows the victim's body on the floor of the bedroom and the blood spatter. These matters corroborate testimony and illustrate the facts in the case. The majority of the tape does not focus on the victim's body.

The probative value of this evidence outweighed any prejudicial effect. The videotape is no more gruesome than the still pictures introduced at trial and fully depicts the trailer's layout and the blood spatter, which the still pictures were unable to do. Accordingly, we find that the trial court correctly allowed this evidence to be admitted over the defendant's objection.

MOTION FOR NEW TRIAL AND MOTION TO QUASH INDICTMENT

In assignment of error number eight, defendant argues that the trial court erred in denying his Motion for New Trial and/or Motion to Quash. Defendant argues that he filed his motion after trial when he discovered that neither of the two assistant district attorneys who prosecuted the case, Mr. Tony Clayton and Ms. Becky Chustz, was competent to represent the state. Specifically, defendant contends

that because there was no oath of office on file with the Secretary of State, neither assistant had the authority to prosecute the case against him or the authority to conduct the grand jury proceedings. Thus, he should receive a new trial.

The motion for new trial is based upon the supposition that injustice has been done the defendant, and unless such is shown to have been the case, the motion shall be denied, no matter upon what allegations it is grounded. In order to obtain a new trial based on newly discovered evidence, the defendant has the burden of showing: (1) the new evidence was discovered after trial, (2) the failure to discover the evidence at the time of trial was not caused by lack of diligence, (3) the evidence is material to the issues at trial, and (4) the evidence is of such a nature that it probably would have produced a different verdict. *State v. Smith,* 697 So.2d 39, 43 (La. App. 1997).

The motion alleges that the new evidence (that the prosecutors did not have the authority to act as assistant district attorneys) was discovered after the trial ended. At the hearing on the motion, there was a stipulation between defendant and the state that the assistant district attorneys were lawyers in good standing and employees of the Office of the District Attorney. Witnesses who testified included the District Attorneys of East Baton Rouge Parish and West Baton Rouge Parish, the two assistant district attorneys, Tony Clayton and Becky Chustz, and an employee of the Secretary of State.

The transcript of the hearing indicates that Mr. Richard Ward, Jr., the District Attorney for the 18th Judicial District Court, identified Mr. Clayton's written oath of office. He had no independent recollection of the signing of the document on September 16, 2003, but was adamant that he did not sign the oath on August 6, 2004, the date it was faxed to the Secretary of State's Office. He recalled that defendant's trial was ongoing on the August date and that he had not signed any such document at that time.

During Mr. Ward's testimony, the trial judge noted that the parties stipulated that the filing of the oath with the Secretary of State took place on August 6, 2004. Mr. Ward further testified that at the beginning of the investigation and handling of the instant criminal proceeding, the assistant district attorneys at issue were employed by him and had the authority to prosecute the case.

Mr. Clayton testified that he signed the oath of office on September 16, 2003. He also recalled being administered the oath of office by Mr. Ward. Deborah Turner, the supervisor of the Secretary of State's Commissions Division, testified that she saw two letters from Mr. Ward addressed to Governor Mike Foster. One was dated September 16, 2003, appointing Mr. Clayton as an assistant district attorney and requesting a commission and oath of office. Her office received these letters on September 17 and September 19, 2003. A notation on the bottom of the letters indicates that the commission,

oath of office, identification card, and Code of Governmental Ethics were mailed from the Secretary of State's office on October 7, 2003.

Ms. Turner also verified that Ms. Chustz had received documents from the Secretary of State that would not have been issued unless her office had received an oath and a request for a commission. Although a search for an oath had proved fruitless, Ms. Turner testified that after six years on file the relevant documents might well have been transferred to archives.

It thus seems probable that Mr. Clayton and Ms. Chustz executed oaths. However, even absent oaths, they were clearly authorized to prosecute the case under Article 63 of the Code of Criminal Procedure[11] by District Attorney Ward, who tried the case with them.

In denying the motion for new trial, the trial judge questioned whether any injustice had been done to defendant. The judge also cited *Thibodeaux v. Comeaux*, 145 So.2d 1, 8 (La. 1962), *cert. denied,* 372 U.S. 914(1963), which recognized that a public officer's failure to qualify under the law does not vitiate his acts if he fulfills the requirements of a de facto officer. *Thibodeaux* indicates that a person is a de facto officer if he exercises the duties of his office

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[11] Article 63 provides the district attorney may employ or accept the assistance of counsel in the conduct of a criminal case.

under color of a valid appointment, but fails to conform to some requirement, such as taking an oath. Herein, the trial judge found that there was no question that the District Attorney appointed Mr. Clayton and Ms. Chustz as his assistants.

After a careful review of the record, we find no abuse of discretion in the trial court's denial of the defendant's motion. First, defendant did not allege in his motion or sustain his burden of showing that the newly discovered evidence would have resulted in a different verdict. Second, as argued by the state at the hearing, defendant did not show any prejudice that resulted to him by the prosecutors' possible failure to have filed their oaths of office with the Secretary of State. Last, we agree with the trial court that it is clear that both of the assistant district attorneys were appointed to their positions by Mr. Ward, and even if they did not fulfill all the requirements, such as the filing of an oath of office, they would have acted in a de facto capacity as prosecutors.

This assignment of error lacks merit.

CONVICTION AND SENTENCE AFFIRMED.

APPENDIX B

Supreme Court of Louisiana
STATE of Louisiana
v.
Derrick Todd LEE.
No. 2007-K-1288.

March 7, 2008

Prior report: La. App., 964 So.2d 967.

In re Lee, Derrick Todd;-Defendant; Applying for Writ of Certiorari and/or Review, Parish of W. Baton Rouge, 18th Judicial District Court Div. B, No. 034925; to the Court of Appeal, First Circuit, No. 2005 KA 0456.

Denied.

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(7)

No. 07-1523

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

DERRICK TODD LEE,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

On Petition for a Writ of Certiorari to the Louisiana Court of Appeal, First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

No. 07-1523

DERRICK TODD LEE,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

On Petition for a Writ of Certiorari to the Louisiana Court of Appeal, First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Geralyn Desoto met her killer, the petitioner, Derrick Todd Lee, at the door of her mobile home in the Parish of West Baton Rouge, Louisiana on January 14, 2002. After Lee convinced her to let him use her telephone, he forced his way in and brutally beat her in the face and head. Though Desoto struggled, she was stabbed into submission and was ultimately killed by Lee when he slashed her throat open. Lee left his footprint in blood on Desoto's chest, indicating he also stomped on her before he left.

DNA collected from the scene conclusively linked Lee to Desoto's murder as well as the murders of sev-

eral other women in South Louisiana from 1992 to 2003.

Lee was indicted by a West Baton Rouge Parish Grand Jury with First Degree Murder and was tried for Second Degree Murder, a violation of LA R.S. 14:30.1, of which he was found guilty.

The Louisiana Court of Appeal, First Circuit affirmed the conviction and sentence obtained in the Eighteenth Judicial District Court of Louisiana;[1] the Louisiana Supreme Court denied writs.[2]

ARGUMENT

I. WHETHER THE CONSTITUTION ALLOWS STATES TO SECURE CRIMINAL CONVICTIONS BY NON-UNANIMOUS JURY VERDICTS IN NON-CAPITAL FELONY CASES?

Prior to 1972, the number of jurors required for a conviction was shaped by tradition. With *Apodaca v. Oregon*, 406 U.S. 404 (1972) and *Johnson v. Louisiana*, 406 U.S. 356 (1972), Louisiana was permitted to allow convictions supported by less than unanimous juries in non-capital felony cases. The principle of stare decisis, therefore, cannot be ignored as is suggested by the petitioner. Though the issue presented requires constitutional analysis, the jurisprudence established must not be disturbed without special justification, which the State of Louisiana asserts does not exist.

This doctrine is essential as it promotes even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity

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[1] *State v. Lee*, 964 So.2d 967 (La.App. 1 Cir. 5/16/07)

[2] *State v. Lee*, 977 So.2d 896 (La. 3/7/08)

of the judicial process. *Hohn v. U.S.*, 524 U.S. 236 (1998); *State Oil Co. v. Khan*, 522 U.S. 3 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

"It is indisputable that stare decisis is a basic self-governing principle with the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.'" *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) citing *Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235 (1970) and The Federalist, No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton). Without a development in the law that undermines precedent, being proven to be impractical or becoming inconsistent with the sense of justice or the social welfare, stare decisis prohibits the petitioner's proposition. *Patterson*, *supra* citing *Runyon v. McCrary*, 427 U.S. 160 (1976).

Neither petitioner nor any of his amici satisfy any of the considerations which would trigger the overruling of *Apodaca* or *Johnson* set out in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992): whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

Louisiana has for some time employed the states' right to obtain a conviction by non-unanimous jury

verdict via its constitution, La. Const. of 1974 Art. I, §17, which provides in pertinent part:

> §17. Jury Trial in Criminal Cases; Joinder of Felonies; Mode of Trial
>
> Section 17.(A) Jury Trial in Criminal Cases. A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. *A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict.* A case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months shall be tried before a jury of six persons, all of whom must concur to render a verdict. The accused shall have a right to full voir dire examination of prospective jurors and to challenge jurors peremptorily. The number of challenges shall be fixed by law. Except in capital cases, a defendant may knowingly and intelligently waive his right to a trial by jury.
>
> (emphasis added)

Pursuant thereto, the Louisiana Code of Criminal Procedure holds:

> Art. 782. Number of jurors composing jury; number which must concur; waiver
>
> A. Cases in which punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. *Cases in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render*

> *a verdict*. Cases in which the punishment may be confinement at hard labor shall be tried by a jury composed of six jurors, all of whom must concur to render a verdict.
>
> B. Trial by jury may be knowingly and intelligently waived by the defendant except in capital cases.
>
> (emphasis added)

Accordingly, in *State v. Jones*, 381 So.2d 416, 418 (La. 1980), the Louisiana Supreme Court held that a non-unanimous verdict in a twelve person jury did not violate the Sixth and Fourteenth Amendments of the U.S. Constitution. In *State v. Simmons,* 414 So.2d 705 (1982), relying on United States Supreme Court jurisprudence, the Louisiana Supreme Court held that the non-unanimous verdict authorized by LSA-C.Cr.P. Art. 782 did not violate a defendant's federal constitutional rights under the Fifth and Fourteenth Amendments. *Simmons*, 414 So.2d at 707. In *State v. Divers*, 889 So.2d 335, 353 (La.App. 2 Cir. 11/23/04), the Louisiana Second Circuit Court of Appeal held that non-unanimous jury verdicts for twelve-individual juries are not unconstitutional.

It is evident that *Apodaca* and *Johnson* have been relied upon by Louisiana Courts and therefore, to force unanimous jury verdicts upon the states would be to impose gratuitous hardship and inequity upon them. While a requirement of unanimity does not materially contribute to the exercise of commonsense judgment,[3] it would create an impediment to justice which is neither called for by the constitution nor logic. Moreover, the *Apodaca / Johnson* rule has become so

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[3] *Apodaca, supra* at 410.

embedded, so accepted, so fundamental an expectation that a change would result in actual dislocations to the states in their application of the Sixth Amendment.

Petitioner's suggestion that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny so undermine *Apodaca* and *Johnson* that their principles are no longer recognizable as sound law, if ever they were, is wholly unsupported. Likewise, petitioner claims that recent decisions regarding the Sixth Amendment's Confrontation Clause, right to counsel, and right to compulsory process and their import to the states through the Fourteenth Amendment create the same expectation of jury verdict unanimity; however, this is not necessarily so. Jury unanimity is distinct from the aforementioned Sixth Amendment rights cited by petitioner, in that, it is nowhere enunciated in the Sixth Amendment. Petitioner's approach to jury unanimity makes an assumption that is not required by the Sixth Amendment.

Furthermore, the position taken by petitioner and its amici, that circumstances have so changed, or come to be seen so differently, as to have stripped *Apodaca* and *Johnson* of their justification, is not compelling in light of the deliberate examination of the Sixth Amendment rights by the *Apodaca/Johnson Court*. The evolution of understanding of the consequence of non-unanimous jury verdicts submitted by the opposition fails to dissolve the reasoning set out in *Apodaca*. The current rule observes that it is neither necessary nor possible to have every distinct voice in the community represented on every jury and to prevent conviction of a defendant in any

case; albeit, that voice has a right to sit on the jury.[4] Additionally, it cannot be assumed that minorities are unable to adequately represent their viewpoints or that the majority will necessarily refuse to weigh the evidence and reach a rational decision.

Petitioner makes much of the recent quotations of William Blackstone[5] by this Court in the line of cases following *Apprendi*; however, the notion that the framers incorporated every common-law feature of the jury into the Sixth Amendment was rejected by the Court in *Williams v. Florida*, 399 U.S. 78, 99 (1970). "[T]here is absolutely no indication in 'the intent of the Framers' of an explicit decision to equate the constitutional and common-law characteristics of the jury." *Id.* The Court has focused instead on "the function that the particular feature performs and its relation to the purposes of that jury trial." *Id.* At 99-100. In *Williams*, the Court rejected the argument that the Sixth Amendment protected a right to a twelve-person jury, even though the history established that it was a common practice very familiar to the framers of the constitution. "To read the Sixth Amendment as forever codifying a feature so incidental to the real purpose of the Amendment is to ascribe a blind formalism to the Framers which would require considerably more evidence than we have been able to discover in the history and language of the Constitution or in the reasoning of our past decisions." *Id.* at 102-03.

It follows then, that the use of Blackstone's remarks on the "unanimous suffrage of twelve of [the defendant's] equals and neighbours" has no more effect

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[4] *Apodaca*, *supra* at 413.

[5] *Commentaries on the Laws of England* (1769)

on *Apodaca* and *Johnson* than it did on *Williams*. Further, if the Court's citation of Blackstone in recent Sixth Amendment analyses was intended to be so controlling as insisted by petitioner, then six person juries, which have also been found to be within the Sixth Amendment, are also vulnerable.

If the *Blakely*[6] Court had intended to overrule what a majority of the Court had held in *Apodaca* and *Johnson* (*i.e.*, a state criminal defendant may be constitutionally convicted by a less-than-unanimous jury), it surely would have done something more than simply quote Blackstone to wipe from the books all that was said in those two decisions about the unanimity rule and the requirements of the Sixth and Fourteenth Amendments. That the Court mentioned neither *Apodaca* nor *Johnson* in *Blakely* is strong indication that it had no intention to overrule those decisions in the course of requiring jury trials for certain sentencing decisions.

Indeed, the Oregon and Louisiana state courts have correctly rejected arguments similar to the one petitioner makes here, concluding that *Apprendi* and *Blakely* do not address the issue of the constitutionality of a non-unanimous jury verdict and, therefore, they do not purport to overrule *Apodaca* or *Johnson*. *See, e.g., State v. Bowen*, 215 Or. App. 199, 202, 168 P.3d 1208, 1209 (2007) ("Nothing in *Blakely* purports to overrule *Apodaca*; indeed, *Blakely* does not include any reference to *Apodaca*. Rather, . . . jury unanimity—or the lack thereof—was immaterial to the analysis in *Blakely*, and its antecedent, *Apprendi* . . ., which both addressed the constitutionally prescribed role of the jury, as opposed to the court, in determin-

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[6] *Blakely v. Washington*, 542 U.S. 296 (2004)

ing facts material to the imposition of criminal sentences."); *State v. Caples*, 938 So.2d 147, 157 (La. App. 1 Cir. 2006), *writ denied*, 955 So.2d 684 (La. 2007) (similarly rejecting challenge to Louisiana's constitutional and statutory provisions permitting less-than-unanimous-jury verdicts in criminal cases). Petitioner offers no good reason for this court to reach a different conclusion.

No circumstance or rationale has been presented which would warrant overturning *Apodaca* and *Johnson*, precedent which has been relied upon for thirty-six years. Consequently, Louisiana law allowing non-unanimous jury verdicts in non-capital felony cases should not be disturbed.

II. WHETHER DNA EVIDENCE INTRODUCED AT PETITIONER'S TRIAL WAS PROPERLY ADMITTED PURSUANT TO THE INEVITABLE DISCOVERY DOCTRINE?

Although the Louisiana Court of Appeal found the collection of Lee's DNA to be constitutional, the Supreme Court of Louisiana held in *State v. Lee*, 976 So.2d 109 (La. 1/16/08), in its review of the Nineteenth Judicial District Court conviction of Lee for the murder of Charlotte Murray Pace, that although the subpoena duces tecum issued by the Twentieth Judicial District of Louisiana to collect a buccal swab of Lee did not meet constitutional requirements for a search, the evidence was admissible pursuant to the inevitable discovery rule.

Lee was first swabbed to obtain his DNA reference by Danny Mixon on May 5, 2003 for an ongoing investigation in East Baton Rouge Parish. Judge G. H. Ware, Jr., Twentieth Judicial District Court, signed

an order entitled "subpoena duces tecum" to obtain Lee's DNA.

The following facts were presented to the Twentieth Judicial District Court to obtain the first DNA sample from Lee in connection with the murders of Connie Warner and Randi Mebruer. Lee was arrested as a Peeping Tom in Oak Shadows Subdivision where both the Warner and Mebruer victims resided. Mebruer disappeared April 18-19, 1998. Lee was interviewed by Zachary Police Officers the day after the disappearance but officers were asked to leave by Lee. A subsequent interview with Lee confirms that the night of Randi Mebruer's disappearance, Lee was out at the Hideaway Lounge in Alsen, Louisiana. He left the lounge and drove to his girlfriend's house. The alleged route taken placed Lee within two (2) blocks of the entrance to Mebruer's subdivision where she was abducted. On file with the Louisiana Department of Public Safety and Corrections exposes a two-pronged history. First, Derrick Todd Lee has a history of predatory and violent arrests for home invasion, peeping tom, stalking, aggravated battery, aggravated flight and attempted first degree murder of a police officer. Lee was convicted for a 1988 attempted unauthorized entry of an inhabited dwelling, a 1992 simple burglary of an inhabited dwelling (this home invasion occurred near Oak Shadows Subdivision, where Mebruer resided at the time of her abduction), a 1995 peeping tom, two (2) 1997 peeping tom incidents (the original arrest was for six (6) counts of trespassing), two (2) counts of peeping tom and resisting arrest, a 1999 stalking (the original arrest was for stalking and peeping tom), and a 2000 aggravated flight. Second, Derrick Todd Lee's criminal history corroborates he was not incarcerated during the murders of Connie Warner, Randi Mebruer or

any other female victim linked to the "serial killer" through DNA analysis.

Thereafter, the defendant was linked via DNA evidence to several murders in South Louisiana, including the Geralyn DeSoto case.

After a hearing on the motion to suppress the DNA evidence obtained via the East Baton Rouge Parish subpoena duces tecum, the trial court ruled that Lee's DNA sample was legally obtained without infringement of his constitutional rights. Hence, the subsequent DNA sample obtained via the West Baton Rouge Motion to Compel was constitutional.

The State argued before the trial court that constitutional safeguards were observed when ordering Lee to submit to the swabbing and maintains that position; however, in light of the Supreme Court of Louisiana's decision to abrogate the lower court's ruling and subsequent application of the inevitable discovery rule in the Nineteenth Judicial District Court's companion case, we, agree that a DNA sample would have inevitably been procured considering the intense investigation which was narrowing to Lee as the serial killer.

Before Lee was approached for a DNA sample, it had been confirmed that several of the Baton Rouge and the Lafayette, Louisiana murders were at the hands of one man. Soon, the investigation opened to races other than Caucasian men. An attempted murder victim from the Parish of St. Martin, Louisiana, D.A., was linked through a partial DNA profile to the other known victims. Lee's only living victim had provided a sketch of him, which produced fruitful tips to the Serial Killer Task Force pointing to Lee. D.A. was also able to identify Lee in a photographic line-up.

Convictions should not be set aside due to a constitutional violation during collection of evidence when the evidence would have been ultimately or inevitably discovered. *Nix v. Williams*, 467 U.S. 431 (1984). In *Nix*, this Honorable Court held that although the defendant's statement providing the location of his victim's body was obtained in violation of the defendant's right to counsel, the search group would have ultimately or inevitably discovered the victim. Therefore, the evidence was deemed admissible as evidence of the location and condition of the body.

The Serial Killer Task Force had already processed 18,000 leads and was investigating Lee prior to the positive DNA test results. Lee would not have escaped law enforcement without an alibi or exclusion by DNA which would have been obtained by consent or other less intrusive means. *State v. Lee*, 976 So.2d 109 at 129 (La. 1/16/08).

Therefore, no societal interest would be served by excluding this evidence; undoubtedly, the probative evidence of Lee's DNA, which was markedly at each crime scene, was properly presented to the jury. That is, the purpose of the exclusionary rule would not be satisfied by the reversal of this conviction in light of the inevitable discovery of the DNA evidence. *Nix*, *supra*.

Thus, this assignment of error should be found to lack merit.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari on behalf of Derrick Todd Lee should be denied.

Respectfully submitted,

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REPLY BRIEF FOR PETITIONER

The State does not dispute that the question whether it may secure felony convictions through nonunanimous jury verdicts is an exceptionally important constitutional issue that arises frequently in its courts, as well as in Oregon's. Nor does the State contest that this case presents an ideal vehicle to resolve the issue.

The only argument the State offers for denying certiorari is that this Court should give *stare decisis* effect to its deeply fractured decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972), which allowed convictions through nonunanimous verdicts. But this argument cannot withstand scrutiny. As the State itself acknowledges, this Court should at least reexamine—and likely overrule—a decision when "related principles of law have so far developed as to have left the old rule no more than a remnant of an abandoned doctrine." BIO 3 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1992) (plurality opinion); *see also Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989) (overruling is proper when doctrinal changes "have removed or weakened the conceptual underpinnings of the prior decision").

Such is precisely the case here. The *Apodaca* plurality concluded that states could disregard the centuries-old rule requiring unanimous jury verdicts so long as states somehow still respect "the function served by the jury in contemporary society." 406 U.S. at 410. This reasoning is irreconcilable with

this Court's current Sixth Amendment jurisprudence, which, as this Court reaffirmed yet again this June, rigorously enforces the historical understanding of the jury-trial right and the other criminal procedure rules that the Amendment constitutionalizes. *See Giles v. California*, 128 S. Ct. 2678, 2692 (2008) ("It is not the role of courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the court's views) those underlying values. The Sixth Amendment seeks fairness indeed—but seeks it through very specific means . . . that were the trial rights of Englishmen."); Pet. for Cert. 8-9. 11-13. Justice Powell concluded that although the Sixth Amendment's jury-trial guarantee requires unanimous verdicts and generally applies to the states, this particular aspect of the guarantee does not bind the states. As the State's silence on the subject indicates, it is impossible to square this "partial incorporation" reasoning with modern case law.

Given that the underpinnings of *Apodaca* have been so severely weakened and that, as the *amicus* filings in this case demonstrate, the practice of allowing convictions through nonunanimous verdicts has such profoundly negative consequences in the criminal justice systems of two states, this Court should not allow the uncertainty concerning the legitimacy of this practice to linger any longer.

CONCLUSION

For the foregoing reasons, as well as those in the petition for certiorari, the petition for writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

DERRICK TODD LEE,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition for a Writ of Certiorari to the Louisiana Court of Appeal, First Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Sixth Amendment right to jury trial, as applied to the States by the Fourteenth Amendment, allows a criminal conviction based on a non-unanimous jury verdict.

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INTEREST OF *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37.2, *amicus curiae* American Bar Association ("ABA") respectfully submits this brief in support of petitioner's request that this Court grant certiorari. Specifically, the ABA requests that this Court reconsider its conclusion in the principal precedent at issue in this case – *Apodaca v. Oregon*, 406 U.S. 404 (1972) – that the Constitution does not require jury unanimity for state criminal convictions. While Justice Powell, in his concurrence, cited 1968 ABA Standards as supporting this conclusion, those ABA Standards had been changed by 1976, based on overwhelming empirical data. Over the succeeding thirty-plus years, the Standards have consistently stated that unanimity should be required in all criminal jury trials.

The ABA is the largest professional membership organization and the leading organization of legal professionals. It has over 413,000 members spanning all 50 states and other jurisdictions, and its members include prosecutors, public defenders, members of the

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Counsel for the petitioner has consented to the filing of all amicus briefs. A letter from the respondent consenting to the filing of this brief has been filed with the Clerk of this Court. Counsel of record for all parties received notice at least ten days prior to the due date of the *amicus curiae*'s intention to file this brief.

federal and state judiciaries, private attorneys, legislators, academics and students.[2]

The ABA's mission "is to be the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence and respect for the law." Among its goals are "[t]o promote improvements in the American system of justice."[3]

In pursuing its mission and goals, the ABA has maintained a long-standing commitment to improvements to the American criminal and civil jury trial systems. This commitment has resulted in standards for criminal jury trials that have influenced policymaking and have frequently been adopted and relied on by courts. In fact, Justice Powell's opinion in *Johnson v. Louisiana*, 406 U.S. 366 (1972), which controlled the outcome in *Apodaca*, cited the ABA's Project on Standards for Criminal Justice, Trial by Jury § 1.1 (Approved Draft 1968), in reaching his conclusion that he saw no constitutional infirmity in the Oregon provision permitting less than unanimous verdicts. *Johnson*, 406 U.S. at 376 (Powell, J., concurring in *Johnson* and concurring in the judgment in *Apodaca*).

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[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any member of the judiciary associated with the ABA. No member of the Judicial Division Council has participated in the adoption or endorsement of the position in this brief, nor was it circulated to any member of the Judicial Division Council prior to filing.

[3] ABA Mission and Association Goals, *available at* http://www.abanet.org/about/goals.html (last visited July 7, 2008).

Based on the ABA's continuing research regarding jury trials, however, the ABA's Commission on Standards of Judicial Administration published its Standards Relating to Trial Courts in 1976, in which Standard 2.10 stated, "The verdict of the jury [in criminal cases] should be unanimous." In the succeeding thirty years, the ABA has not wavered from this standard.

As this Court noted in 2005, it "long ha[s] referred to the[] ABA Standards as guides to determining what is reasonable." *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (quoting *Wiggins v. Smith*, 539 U.S. 510, 524 (2003), and *Strickland v. Washington*, 466 U.S. 668, 688 (1984)) (internal punctuation and quotation marks omitted). With its deep and long-standing commitment to examining whether criminal jury verdicts should be unanimous, the ABA believes its unique and informed perspective may be of assistance to the Court in this matter.

SUMMARY OF ARGUMENT

Justice Powell, in his concurrence in *Apodaca v. Oregon*, 406 U.S. 404 (1972), determined that the Constitution does not require unanimous jury verdicts in state criminal trials. While this determination was based in part on a 1968 ABA standard that accepted less-than-unanimous verdicts, the ABA changed its Standard in 1976 to affirm that a jury verdict in criminal trials should be unanimous.

Throughout the thirty-plus years since *Apodaca* was decided, the ABA has continued to affirm that a unanimous verdict should be a fundamental part of a criminal defendant's right to a jury trial. Most recently, in 2005, as the result of its American Jury

Project, the ABA adopted nineteen core jury trial principles, one of which provides that a unanimous decision should be required in all criminal cases heard by a jury.

The ABA's standards have always been based on comprehensive review of research and empirical data on the jury's role in the criminal justice system. This work, some of which is discussed below, has led the ABA to conclude that a non-unanimous decisional process reduces the reliability of jury determinations, silences minority viewpoints, erodes confidence in the criminal justice system, and does not significantly contribute to a reduction in hung juries and retrials.

Because each member of the *Apodaca* Court agreed on the importance of thorough jury deliberations, attention to minority viewpoints and community confidence in jury verdicts, and because the ABA's review of research and empirical data, as well as the consensus of the legal community, has concluded the opposite occurs through a non-unanimous decision process, the ABA supports petitioner's request that *Apodaca* be revisited.

ARGUMENT

I. ABA STANDARDS AFTER 1976 AND ITS 2005 PRINCIPLE ON JURY UNANIMITY FOR CRIMINAL TRIALS SUPPORT RECONSIDERATION OF *APODACA*.

A. *Apodaca* Relied On The 1968 ABA Standards.

As petitioner explains, this Court's decision in *Apodaca* permitting non-unanimous jury verdicts in

state criminal trials was the product of an unusual combination of disparate positions, in which five Justices agreed that the Sixth Amendment requires unanimous jury verdicts, and eight Justices agreed that the Sixth Amendment applies in full to the states. *See* Pet. 7-11. Notwithstanding this agreement, Justice Powell's separate opinion, and thus this Court's judgment, concluded that the Constitution does not require states to convict by unanimous verdicts.

Justice Powell viewed the unanimity question as requiring "a fresh look at the question of what is fundamental in jury trial." *Johnson*, 406 U.S. at 376 (Powell, J., concurring in the judgment). Justice Powell determined that deviation from the constitutional standard of unanimity for federal convictions was appropriate in part because "[l]ess-than-unanimous verdict provisions . . . have been viewed with approval by the American Bar Association's Criminal Justice Project." *Johnson*, 406 U.S. at 377 & n.19 (citing *ABA Standards for Criminal Justice, Trial by Jury*, Standard 1.1 (Approved Draft 1968) (hereinafter "*1968 Criminal Justice Standards*")).

In 1972, when *Apodaca* was decided, Standard 1.1 of the *1968 Criminal Justice Standards* provided, in pertinent part:

> 1.1 Right to jury trial.
>
> Defendants in all criminal cases should have the right to be tried by a jury of twelve whose verdict must be unanimous, except that where not barred by applicable constitutional provisions, the right to jury trial may be limited in one or more of the following ways:

* * * *

(d) by permitting less than unanimous verdicts, without regard to the consent of the parties.

In the Commentary to the 1968 Criminal Justice Standard 1.1, the Advisory Committee reviewed current thinking on jury unanimity and "concluded that the minimum standards should recognize the propriety of less than unanimous verdicts, as now permitted in six states." 1968 Criminal Justice Standards, *supra*, at 28.[4]

The *1968 Standards for Criminal Justice, Trial by Jury,* was but one volume – volume 15 – of the seventeen volumes that comprised the ABA's *Project on Standards for Criminal Justice.* In 1974, on the occasion of publication of a compilation of the "black letter" standards of all seventeen volumes, Chief Justice Warren E. Burger noted, "The Standards are a balanced, practical work intended to walk the fine line between the protection of society and the protection of the constitutional rights of the accused individual." *Introduction: The ABA Standards for Criminal Justice,* 12 Am. Crim. L. Rev. 251, 252 (1974).

B. By 1976, The ABA Had Concluded That Unanimous Juries Should Be Required In Criminal Trials.

In 1976, however, another ABA commission, the Commission on Standards of Judicial Administration,

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[4] The 1968 Standard 1.1 and its Commentary are available from the American Bar Association.

published its final draft of the *Standards Relating to Trial Courts* (hereinafter "*1976 Judicial Standards*"), in which its Standard 2.10 stated, in pertinent part, "The verdict of the jury [in criminal cases] should be unanimous."

In the Commentary to its 1976 Judicial Standard 2.10, the Commission acknowledged that this was an enlargement to the scope of the jury trial right stated in the 1968 Criminal Justice Standard 1.1, but concluded, "If the question of jury trial in criminal cases is considered from a long range viewpoint, placing the present exigencies of the trial courts in proper perspective, these qualifications [in 1968 Standard 1.1] appear to be both unnecessary and unwarranted by our legal traditions." Id. at 24.[5]

The *1976 Judicial Standards* were adopted at the ABA's Midyear Meeting in February 1976. In the course of their adoption, the ABA also authorized amendment to the *1968 Criminal Justice Standards* to conform to the *1976 Judicial Standards,* specifically affirming that, "[i]n criminal cases, the verdict of the jury should be unanimous." *ABA Summary of Action of the House of Delegates, Midyear Meeting, Report of the Commission on Standards of Judicial Administration*, at 18 (1976).

Accordingly, when the 1978 edition of Volume 15 of the *Standards for Criminal Justice* (hereinafter "*1978 Criminal Justice Standards*") was published, its Introduction stated: "Incorporating the ABA Standards of Judicial Administration, this updated

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[5] The 1976 Judicial Standard 2.10 and its Commentary are available from the American Bar Association.

standard [15-1.1] has been changed by deletion of . . . (1) recogni[tion] [of] the propriety of nonunanimous jury verdicts." *1978 Criminal Justice Standards*, Introduction at 15.4.[6]

Any support that the ABA's *1968 Trial Court Standards* had lent to a position that permitted non-unanimous verdicts had thus ended, by 1976.

C. In 2005, The ABA Reaffirmed Its Commitment To Unanimous Verdicts In Criminal Trials.

Throughout the next thirty-plus years, the ABA has continued to conclude that a unanimous verdict should be a fundamental part of a criminal defendant's right to a jury trial.[7] Most recently, in 2004, the ABA established the American Jury Project, the result of which was the promulgation of nineteen core jury trial principles that defined the ABA's "fundamental aspirations for the management of the jury system." *ABA Principles for Juries and Jury Trials*, Preamble, at 1 (2005) (hereinafter "*2005 Jury Trial Principles*"). Principle 4.B provides that

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[6] The 1978 Criminal Justice Introduction, Standard 1.1 and its Commentary are available from the American Bar Association.

[7] See, e.g., ABA Standards Relating to Juror Use and Management (1983); ABA Standards Relating to Trial Courts (1992), ABA Standards Relating to Juror Use and Management (1993 update); and ABA Criminal Justice Standards (1996). Each is available from the ABA.

"[a] unanimous decision should be required in all criminal cases heard by a jury." *Id.* at 21.[8]

The ABA's long-standing position on jury unanimity in criminal trials is the result of its continuing and comprehensive study of the jury's role in the criminal justice system. Based on accumulated experiences and empirical data, and the evolved consensus of the legal community, it is the ABA's position that the "fresh look" authorized by *Apodaca* in 1972 has run its course.

II. EMPIRICAL RESEARCH, WHICH IS THE HEART OF ABA STANDARDS, SUPPORTS RECONSIDERATION OF *APODACA V. OREGON*.

A. The *Apodaca* Court Agreed On The Importance Of Thorough Jury Deliberations, Attention To Minority Viewpoints, And Community Confidence In Jury Verdicts.

Despite their differing opinions, every member of the *Apodaca* Court agreed on the importance of thorough jury deliberations, attention to minority viewpoints, and community confidence in jury verdicts. The plurality,[9] concurring, and dissenting

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[8] The *2005 Jury Trial Principles, Principle 4* and its Commentary are available from the American Bar Association.

[9] The *Apodaca* plurality was joined by Justice Powell in deciding *Johnson*, making the opinion in that case one for the Court. *Johnson* involved a parallel issue but, because the trial in that case had preceded *Duncan v. Louisiana*, 391 U.S. 145

opinions disagreed, however, on the effect that non-unanimous decision rules would have on the jury's deliberative process. *Compare Johnson v. Louisiana*, 406 U.S. 356, 361 (1972) (contending that jury members would not automatically and prematurely "cease discussion and outvote a minority" under a non-unanimous decision rule), *and id.* at 374 & n.12 (Powell, J., concurring in the judgment) (predicting that community confidence in jury verdicts would not diminish under a rule permitting non-unanimous verdicts, and that such a rule would "not substantially affect[]" the jury-trial protection), *with id.* at 388 (Douglas, J., dissenting) (warning that non-unanimous verdicts "diminish[] the reliability of a jury"), *and id.* at 398 (Stewart, J., dissenting) (explaining that non-unanimous verdicts suppress consideration of minority viewpoints, and "corrode[]" "community confidence in the administration of criminal justice").

Little empirical research on jury behavior existed at the time this Court decided *Apodaca* that might have confirmed or disproved these competing predictions. Since that time, however, extensive studies have been conducted that support reconsideration of that ruling.

When the ABA revised its Criminal Justice Standards in 1978, it explained that several changes

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(1968), the applicability of the Sixth Amendment was not in question. The empirical assumptions expressed in the Court's opinion in *Johnson* therefore represent those of the *Apodaca* plurality as well as Justice Powell, who echoed these assumptions in his opinion concurring in *Johnson* and concurring in the judgment in *Apodaca*.

in the standards, including the shift to unanimous jury verdicts, were made "to reflect the experience gained in the past decade and new perspectives in the wide-ranging topic of jury trial." *1978 Criminal Justice Standards, supra*, Commentary at 15.4. In its 2005 *Principles for Juries and Jury Trials*, the ABA discussed empirical studies showing that a non-unanimous decision process reduces the reliability of jury determinations, silences minority viewpoints, and erodes confidence in the criminal justice system. *2005 Principles for Juries and Jury Trials,* Principle 4.B Commentary, *supra*, at 22. Also in the 2005 *Principles for Juries and Jury Trials*, the ABA concluded that studies had demonstrated that another justification for non-unanimity — a reduction in hung juries and retrials — was overstated. *Id.* at 23.

In light of this amassed data, which shows that the non-unanimous process in criminal jury trials does not foster thorough jury deliberations, attention to minority viewpoints, or community confidence in jury verdicts, the ABA suggests that *Apodaca*'s holding should be reconsidered.[10]

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[10] This Court has been particularly receptive to empirical evidence when assessing the constitutional contours of the jury trial right. *E.g., Ballew v. Georgia*, 435 U.S. 223, 231 n.10 (1978) (opinion of Blackmun, J.) (stating that social science research on jury size "provide[s] the only basis, besides judicial hunch, for a decision about whether smaller and smaller juries will be able to fulfill the purpose and functions of the Sixth Amendment").

B. Non-Unanimous Verdicts Reduce The Reliability Of Jury Determinations.

In the Commentary to Principle 4.B of the *2005 Jury Trial Principles*, the ABA concluded that empirical data had shown that non-unanimous decision rules materially alter jury deliberations and decrease the reliability of verdicts, stating:

> Implicit in [the historical preference for unanimous juries] is the assumption that unanimous verdicts are likely to be more accurate and reliable because they require the most wide-ranging discussions – ones that address and persuade every juror. Empirical assessment tends to support this assumption. Studies suggest that where unanimity is required, jurors evaluate evidence more thoroughly, spend more time deliberating and take more ballots. . . . In contrast, where unanimity is not required juries tend to end deliberations once the minimum number for a quorum is reached.

2005 Jury Trial Principles, *supra*, at 22 (citing Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psych. Pub. Pol'y & L. 622, 669 (2001)). *See also* Kim Taylor-Thompson, *Empty Votes In Jury Deliberations*, 113 Harv. L. Rev. 1262, 1273 (2000) (citing empirical research demonstrating that "majority rule discourages painstaking analyses of the evidence and steers jurors toward swift judgments that too often are erroneous or at least highly questionable"); Reid Hastie et al., *Inside the*

Jury 60 tbl.4.1 (1983) (finding that 12-member jurors required to reach a unanimous verdict deliberated for 138 minutes on average, whereas those required to reach an 8-member majority only deliberated for an average of 75 minutes). Further, research has shown that individual jurors are themselves less confident in the decisions they reach under non-unanimous decision rules. *See* Nemeth, *supra*, at 53; Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. Cal. Interdisc. L.J. 1, 41 (1997) ("[T]he existence of dissenters left even the majority with some lingering doubts that it had reached the right verdict.").

The ABA's review of this and other research calls into question the *Apodaca* plurality's earlier prediction that, from a functional standpoint, there would exist "no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one." *Apodaca*, 406 U.S. at 411 (plurality opinion).

C. Non-Unanimous Verdicts Allow Juries To Reach A Quorum Without Seriously Considering Dissenting Viewpoints.

Empirical studies also do not support the *Apodaca* plurality's prediction that dissenting viewpoints "will be heard" even under non-unanimous decision rules. *Apodaca*, 406 U.S. at 413 (plurality opinion); *see also Johnson*, 406 U.S. at 361 ("We have no grounds for believing that majority jurors . . . would simply refuse to listen to arguments presented to them in favor of acquittal, terminate discussion, and render a verdict.").

As the ABA found, "Unanimous verdicts [] protect jury representativeness – each point of view must be considered and all jurors persuaded." *2005 Jury Trial Principles*, Principle 4.B Commentary, *supra*, at 24 (citing Hastie et al., *Inside the Jury*, *supra*, at 45-58; Valerie P. Hans, *The Power of Twelve: the Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 Del. L Rev. 2, 23 (2001); Dennis J. Devine et al., *supra*, at 669). The ABA also concluded that "minority jurors participate more actively when decisions must be unanimous." *Id.*

Researchers have found that, in contrast to the "deliberate, ponderous atmosphere" characteristic of deliberations of unanimous juries, "larger factions in majority rule juries adopt a more forceful, bullying, persuasive style," possibly "because their members realize that it is not necessary to respond to all opposition arguments when their goal is to achieve a faction size of only eight or ten members." Hastie et al., *supra*, at 112; *see also* Saks, *supra*, at 40 ("Compared to unanimous rule juries, quorum rule juries have been found to deliberate less equitably (that is, the distribution of talking is skewed more extremely, with the talkative jurors talking more and the untalkative talking less than in unanimous rule juries).").

Further, evidence indicates that women and racial minorities are particularly likely to hold dissenting viewpoints on juries that are discounted under a non-unanimous decision rule. *See* Taylor-Thompson, *supra*, at 1264 ("If—as is often true—the views of jurors of color and female jurors diverge from the mainstream, nonunanimous decisionmaking rules can operate to eliminate the voice of difference

on the jury."). As Justice Stewart warned, "Under [*Apodaca* and *Johnson*], nine jurors can simply ignore the views of their fellow panel members of a different race or class." *Johnson*, 406 U.S. at 397 (Stewart, J., dissenting). In related areas implicating Sixth Amendment rights, this Court has stringently protected the participation of women and minorities on juries. *See, e.g.*, *J.E.B. v. Alabama* ex rel. *T.B.*, 511 U.S. 127, 135 (1994); *Georgia v. McCollum*, 505 U.S. 42, 59 (1992); *Batson v. Kentucky*, 476 U.S. 79, 89 (1986).

Researchers also have found that permitting non-unanimous verdicts "discourage[s] meaningful examination of opposing viewpoints" and thus "impoverishes deliberations." Taylor-Thompson, *supra*, at 1264. Further, as panels are required to reach unanimity, "jurors at the extremes may be driven to a compromise, which they would otherwise reject, and a fairer verdict may result." 1996 Criminal Justice Standards, *supra*, Standard 15-1.1 Commentary, at 126 (citing Edwin P. Schwartz & Warren F. Schwartz, *Decisionmaking by Juries Under Unanimity and Supermajority Voting Rules*, 80 Geo. L.J. 775 (1992).

As then-Circuit Judge Anthony Kennedy recognized in 1978, unanimous decision rules facilitate deliberation by ensuring that dissenting voices are heard and accepted or rejected, thus lending "particular significance and conclusiveness to the jury's verdict." *United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir. 1978) (Kennedy, J.).

D. Non-Unanimous Verdicts Undermine The Community's Confidence In The Justice System.

Empirical evidence similarly undercuts Justice Powell's prediction in *Apodaca* that unanimous jury verdicts would not be "entitled to greater respect in the community." *Johnson*, 406 U.S. at 374 (Powell, J., concurring in the judgment). Instead, research has demonstrated that a non-unanimous decision rule "fosters a public perception of unfairness and undermines acceptance of verdicts and the legitimacy of the jury system." *2005 Jury Trial Principles*, Principle 4.B Commentary, *supra*, at 22 (citing Taylor-Thompson, *Empty Votes In Jury Deliberations*, *supra*, at 1273). *See also* Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 Law & Hum. Behav. 333, 337-38 & tbl.1 (1988) (citizens consider unanimous juries to be more accurate, more thorough, more likely to account for the views of jurors holding contrary views, more likely to minimize bias, better able to represent minorities, and fairer); Barbara A. Babcock, *A Unanimous Jury Is Fundamental to Our Democracy*, 20 Harv. J.L. & Pub. Pol'y 469, 472 (1997) (the need to reach consensus promotes the credibility of the judgment because "[a] unanimous verdict is a major accomplishment and carries with it moral authority that a split decision lacks"); Jeffrey Abramson, *We, The Jury: The Jury System and the Ideal of Democracy* 182 (1994) (unanimity serves as a "pillar of popular faith in the legitimacy and accuracy of jury verdicts").

As then-Circuit Judge Anthony Kennedy recognized in 1978, "[b]oth the defendant and society can place special confidence in a unanimous verdict." *Lopez*, 581 F.2d at 1341.

E. The Connection Between Unanimity And Hung Juries Has Been Overstated.

Justice Powell's opinion in *Apodaca* suggested that eliminating unanimity requirements "could well minimize the potential for hung juries occasioned either by bribery or juror irrationality." *Johnson*, 406 U.S. at 377 (Powell, J., concurring in the judgment). Studies of hung juries largely negate those concerns, however, and instead bolster arguments favoring unanimity.

The ABA's research has shown that juries rarely hang because of one or two obstinate jurors. *2005 Jury Trial Principles*, Principle 4.B Commentary, *supra*, at 23 (citing Taylor-Thompson, *Empty Votes In Jury Deliberations*, *supra*, at 1317 (2000). To the contrary, "[g]enerally, when deadlocks occur, they reflect genuine disagreement over the weight of the evidence and arise within juries that had substantial differences in verdict preference at the outset of deliberations," *id.* (citing Paula L. Hannaford-Agor et al., *Are Hung Juries a Problem?*, National Center for State Courts (2002), at 7, *available at* http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesExecSumPub.pdf.; Hastie et al., *Inside the Jury*, *supra*, at 166-67; and Saks, *supra*, at 41).

As other research shows, eccentric or irrational holdout jurors do not normally derail unanimity. Instead, "[t]he majority of hung juries in criminal

cases in which unanimity is required do not reflect a lone holdout or even two dissenters, but rather a more evenly divided final vote." Diamond et al., *supra*, at 228. Juries tend to deadlock only when there is a "massive minority of 4 or 5 jurors" – rather than just one or two holdouts – at the beginning of the deliberative process, even if the number of dissenters is later reduced. *See* Kalven & Zeisel, *supra*, at 462.

Further, it is the complexity of the case that affects the likelihood of jury deadlock: one study found the incidence of hung juries to be ten percent in close, difficult cases, but only two percent in clear, easy cases. Kalven & Zeisel, *supra*, at 457. In fact, in a study of civil cases, the judges agreed with holdout jurors over forty percent of the time when a non-unanimous verdict was rendered, and disagreed with the jury in approximately twenty percent of the cases in which the verdict was unanimous. Diamond et al., *supra*, at 222. "[T]he agreement between the judge and the holdout jurors on a substantial number of cases suggests that the conflict on some of these juries posed precisely the kind of challenge to the majority position that a deliberative process should welcome." *Id.*

Finally, research has shown only a small increase in the number of hung juries when jury unanimity is required: one survey of trial judges found that only 5.6% of criminal juries hang when unanimous verdicts are required, while 3.1% deadlock when majority verdicts are allowed. *2005 Jury Trial Principles*, Principle 4.B Commentary, *supra*, at 23 (citing Harry Kalven, Jr. & Hans Zeisel, *The American Jury* 461 (1966)). The costs of hung juries

also are exaggerated, as shown by a study of California cases in which only twenty-six percent of cases in which the jury deadlocked resulted in a retrial; all other cases were disposed of by guilty plea or dismissal. Leo J. Flynn, *Does Justice Fail When the Jury is Deadlocked?*, 61 Judicature 129, 133 (1977).

As a recent comprehensive study of hung juries reported, eliminating unanimous decision rules for jury verdicts "would be unlikely to tap the true causes of hung juries: evidentiary factors, problematic deliberations, and juror attitudes about fairness." Hannaford-Agor et al., *supra*, at 7.

Because the ABA's review of research into the non-unanimous jury process does not support a conclusion that it reduces hung juries, the ABA lends its support to the petitioner's request that *Apodaca* be revisited.

CONCLUSION

For the reasons set forth above, the ABA respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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No. 07-1523

In the Supreme Court of the United States

DERRICK TODD LEE,
Petitioner

v.

LOUISIANA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL, FIRST CIRCUIT

BRIEF OF *AMICUS CURIAE* THE FEDERAL PUBLIC DEFENDER FOR THE DISTRICT COURT OREGON IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The Federal Public Defender for the District of Oregon seeks leave to file as an *amici curiae* on Question 1 of the Petition for Writ of *Certiorari*, whether a criminal conviction based on a non-unanimous jury poll violates the Sixth and Fourteenth Amendments.[2]

The Federal Public Defender for the District of Oregon has a twenty-five year history of active representation of petitioners in actions pursuant to 28 U.S.C. § 2254, before the United States District Court for the District of Oregon and the United States Court of Appeals for the Ninth Circuit. A significant portion of these actions involve convictions by non-unanimous jury verdicts, which is allowed in Oregon pursuant to the Constitution of the State of Oregon, Article I,

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[1] Pursuant to Rule 37.3, counsel for *amicus* states that the parties have consented to the filing of this brief; letters of consent from the parties have been submitted to the Clerk of Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

[2] *Amicus curiae* believe that the requirement for unanimity is grounded in the right to proof beyond a reasonable doubt based in either the jury trial protections of the Sixth Amendment or the Due Process protections of the Fifth and Fourteenth Amendments. Regardless of where the right it based, it is a fundamental component of the American system of justice.

Section 11.[3]

The Federal Public Defender has several matters pending before both the district courts and the Ninth Circuit Court of Appeals raising the substantive issue of whether a deprivation of liberty based on a non-unanimous jury poll violates the Sixth Amendment to the Constitution of the United States presented as Question 1 in this matter, and additional procedural matters that are not presented here. Cases pending before the Ninth Circuit include: *Pickett v. Hall*, Ninth Circuit Case No. 07-35686 (fully briefed and pending argument);[4] *Reedy v. Blacketter*, Ninth Circuit Case No. 08-35188 (in the briefing stages); and *Burris v. Belleque*, Ninth Circuit Case No. 08-35234 (seeking a Certificate of Appealability on this issue).

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[3] As with other jurisdictions, the vast majority of criminal convictions in Oregon are pursuant to a guilty plea. Statistics made available by the Oregon Justice Department reflect that for the calendar year of 2007, there were a total of 37,716 felony cases filed in the State of Oregon, of which only 994 – 2.6% – proceeded through a jury trial. *See* www.ojd.state.or.us/osca/documents/2007_Stats_Table_6_001.pdf. *Amici curiae* are not aware of any statistics that are kept on the number of convictions that are based on a non-unanimous jury poll. Inquiry of criminal trial lawyers in the state, including with the public defender offices in the major metropolitan areas of Portland and Eugene, indicate that between one-third and one-half of all criminal convictions after a jury trial are through non-unanimous verdicts.

[4] Mr. Pickett's case is illustrative. On June 13, 2000, Mr. Pickett was 42 years old, and was convicted of a felony crime by jury poll of 10-2. As a result, he was sentenced to a term of 375 months in prison, or over 30 years. Should Mr. Pickett survive to be potentially paroled in his 70s, he will be on post-prison supervision for another 20 years.

In addition, the Federal Public Defender undertakes continuing legal education exchanges with Oregon's State Public Defender's Office, which is actively pursuing the substantive question in appeals pending before the Oregon state courts. Published results in cases raising this issue before the Oregon state courts include: *State v. Miller*, 214 Or. App. 494, 166 P.3d 591 (2007), *as amended*, 217 Or. App. 576, 176 P.3d 425 (Or. App. 2008); *State v. Phillips*, 217 Or. App. 93, 174 P.3d 1032 (Or. App. 2007); *State v. Norman*, 216 Or. App. 475, 174 P.3d 598 (Or. App. 2007); *State v. Bowen*, 215 Or. App. 199, 168 P.3d 1208 (Or. App. 2007); *State v. Basargin*, 213 Or. App. 515, 162 P.3d 325 (Or. App. 2007); *State v. Rennells*, 213 Or. App. 423, 162 P.3d 1006 (Or. App. 2007).

A ruling on the substantive issue will, therefore, have direct impact on numerous cases pending before the federal and state courts in the district of Oregon.

STATEMENT OF THE CASE

Amici curiae join the statement of the case presented by counsel for Petitioner. In addition, *amici curiae* note that in 1934, Oregon adopted a state constitution which allowed, in Article I, § 11, that in all cases save first degree murder, criminal convictions could be entered, and individuals could be deprived of their liberty, by a jury poll of 10-2. The article reads:

> In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; to be

> heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor; provided, however, that any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise; provided further, that the existing laws and constitutional provisions relative to criminal prosecutions shall be continued and remain in effect as to all prosecutions for crimes committed before the taking effect of this amendment.

Oregon and Louisiana are the only two jurisdictions allowing individuals to be convicted of a crime by a non-unanimous jury poll. *See* Diamond, Rose & Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U.L. REV. 201, 203 (2006) ("jury verdicts in felony trials must be unanimous in federal courts and in all states except Louisiana and Oregon").

SUMMARY OF ARGUMENT

Depriving an individual of his liberty and freedom based on a non-unanimous jury poll is a violation of the fundamental rights including the right to a trial by jury, to proof beyond a reasonable doubt, and to due process, as guaranteed in criminal trials in state courts by the Sixth and Fourteenth Amendments to the Constitution of the United States. When a properly constituted jury is not able to reach a unanimous verdict, the state has failed to sustain its burden of proving beyond a reasonable doubt that the accused has committed any crime.

Criminal convictions by non-unanimous juries were left standing almost forty years ago in the companion decisions of *Apodaca v. Oregon*, 406 U.S. 404 (1972) (*plurality*) and *Johnson v. Louisiana*, 406 U.S. 366 (1972) (*plurality*). The opinions presented a fractured analysis, with the resolution turning on the opinion of a single justice, Justice Powell, that, while the Sixth Amendment required proof beyond a reasonable doubt to a unanimous jury in federal criminal trials, those rights were not wholly incorporated to the states through the Fourteenth Amendment.

The rational of *Apodaca/Johnson* has been called into question by a series of majority decisions that reexamine and reaffirm the jury trial guarantees of the Sixth Amendment, including *Jones v. United States*, 526 U.S. 227 (1999), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002), *Blakely v. Washington*, 542 U.S. 296 (2004), and

Cunningham v. California, 127 S. Ct. 856 (2007).

Question 1 of the petition asks this Court whether *Apodaca/Johnson* remains valid because a deprivation of liberty based on a non-unanimous jury poll is incompatible with the protections of the Sixth and Fourteenth Amendments recognized in these more recent majority opinions. *Amici curiae* join with counsel for the Petitioner in urging this Court to accept *certiorari* to resolve Question 1, and to reaffirm that the our constitution guarantees that no individual may be deprived of his liberty unless the state has "suffer[ed] the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours,'". *Blakely*, 542 U.S. at 313-314 (quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769).)

ARGUMENT

I. The *Apodaca/Johnson* Analysis Regarding Non-Unanimous Juries Is Incompatible With This Court's Recent Jurisprudence.

A. The Analysis in *Apodaca/Johnson*.

In *Duncan v. Louisiana*, 391 U.S. 145, 148-149 (1968), this Court confirmed that the Sixth Amendment right to a jury trial applied to state court criminal proceedings through incorporation via the Due Process Clause of the Fourteenth Amendment. Two years later the Court was asked to consider whether a conviction based on a non-unanimous jury poll was compatible with these rights in cases arising

from the only two jurisdictions that allowed such convictions, Oregon and Louisiana.

The cases bracketed the decision in *Duncan v. Louisiana*, with *Johnson v. Louisiana* predating that decision, and *Apodaca v. Oregon* post-dating. Note, *Non-Unanimous Jury Verdicts*, 86 HARV. L. REV. 148, 148-149 (1972). Because of the timing, Johnson challenged the non-unanimity based primarily on the Fourteenth Amendment while Apodaca rested his contentions on the Sixth Amendment, arguing that unanimity under the Sixth Amendment was critical for giving meaning to the requirement for proof beyond a reasonable doubt. As the Court explained:

> Petitioners nevertheless argue that unanimity serves other purposes constitutionally essential to the continued operation of the jury system. Their principal contention is that a Sixth Amendment 'jury trial' made mandatory on the States by virtue of the Due Process Clause of the Fourteenth Amendment, *Duncan v. Louisiana, supra*, should be held to require a unanimous jury verdict in order to give substance to the reasonable-doubt standard otherwise mandated by the Due Process Clause. See *In re Winship*, [397 U.S. 358 (1970)].

Apodaca, 406 U.S. at 411.

No majority was reached. Several justices opined that the Sixth Amendment guaranteed neither

proof beyond a reasonable doubt nor a unanimous jury in any criminal case:

> Petitioners' argument that the Sixth Amendment requires jury unanimity in order to give effect to the reasonable-doubt standard thus founders on the fact that the Sixth Amendment does not require proof beyond a reasonable doubt at all.

Apodaca, 406 U.S. at 412, & 407-408 (White, J., joined by Warren, C.J., Blackmun, J., and Rehnquist, J.). Other justices believed that those guarantees had always been contained in the Sixth Amendment and must apply equally to criminal trials before any state court via the due process provisions of the Fourteenth Amendment:

> In *Duncan v. Louisiana*, [*supra*] the Court squarely held that the Sixth Amendment right to trial by jury in a federal criminal case is made wholly applicable to state criminal trials by the Fourteenth Amendment. Unless *Duncan* is to be overruled, therefore, the only relevant question here is whether the Sixth Amendment's guarantee of trial by jury embraces a guarantee that the verdict of the jury must be unanimous. The answer to that question is clearly 'yes,' as my Brother Powell has cogently demonstrated in that part of his concurring opinion that reviews almost a

> century of Sixth Amendment adjudication.

Apodaca, 406 U.S. at 414 (Stewart, J., joined by Brennan and Marshall, *dissenting*)

The plurality ultimately turned on whether the Sixth Amendment jury trial rights that demanded unanimity were fully incorporated to the states through the Fourteenth Amendment, or whether the rights that were incorporated were less stringent than those mandated in federal trials. Justice Powell, writing for himself alone in a concurring opinion, concluded that the Sixth Amendment rights were not fully incorporated:

> I concur in the plurality opinion in this case insofar as it concludes that a defendant in a state court may constitutionally be convicted by less than a unanimous verdict, but I am not in accord with a major premise upon which that judgment is based. Its premise is that the concept of jury trial, as applicable to the States under the Fourteenth Amendment, must be identical in every detail to the concept required in federal courts by the Sixth Amendment. I do not think that all of the elements of jury trial within the meaning of the Sixth Amendment are necessarily embodied in or incorporated into the Due Process Clause of the Fourteenth Amendment.

Johnson, 406 U.S. at 366 (Powell, J., concurring). Because his is the narrowest view of any justice concurring in the judgments, Justice Powell's analysis is deemed the holding of the Court. *Marks v. United States*, 430 U.S. 188, 193 (1977).

B. This Court's Recent Jurisprudence Confirms The Right To Proof Beyond a Reasonable Doubt as a Component of the Jury Trial Guarantee, in Both Federal and State Criminal Cases.

In a series of decisions starting with *Jones v. United States*, this Court has analyzed the protections of the Sixth Amendment, including the questions of whether those protections guarantee the right to proof beyond a reasonable doubt of every fact alleged by the state that supports a deprivation of liberty, and whether the requirement for such proof extends to criminal trials in state court proceedings. This Court has repeatedly answered 'yes' to both questions.

In *Jones*, this Court held simply that the Sixth Amendment guarantees the right to have any fact that is an element of the offense "must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." 526 U.S. at 232. *Jones* was a federal criminal trial involving statutory interpretation, but in *Apprendi v. New Jersey*, this Court referenced *Jones* in confirming that these rights extended to state criminal trial under Sixth and Fourteenth Amendments:

> We [in *Jones*] noted that "under the Due

> Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.*, at 243, n. 6, 119 S. Ct. 1215. The Fourteenth Amendment commands the same answer in this case involving a state statute.

Apprendi, 530 U.S. at 476. This Court reconfirmed its analysis two years later in *Ring v. Arizona*:

> The dispositive question, we said, "is one not of form, but of effect." [*Apprendi*, 530 U.S.] at 494, 120 S. Ct. 2348. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt

536 U.S. at 602. [5]

Two years after *Ring*, this Court again applied the jury trial rights of the Sixth Amendment to state court proceedings, and confirmed that the requirement

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[5] In doing so, this Court overturned the prior ruling of *Walton v. Arizona*, 497 U.S. 639 (1990), noting that *Walton* was incompatible with its analysis of its Sixth Amendment rights recognized in *Apprendi*. *Ring*, 536 U.S. at 609.

for proof beyond a reasonable doubt was within the Framer's original intent for the Sixth Amendment:

> The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbours," 4 Blackstone, Commentaries, at 343, rather than a lone employee of the State.

Blakely, 542 U.S. at 313-14. And in *Cunningham v. California*, this Court recognized it has:

> [R]epeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence.

127 S. Ct. at 863-64.

While these cases involved facts justifying a greater sentence after a defendant had already been convicted – by a unanimous jury in each and every case – there is no basis to distinguish the determination of guilt of any crime in the first instance.

C. Holdings From *Jones* to *Cunningham* Are Incompatible With the *Apodaca/ Johnson* Pluralities.

The plurality analyses that left standing convictions by non-unanimous juries in *Apodaca/ Johnson* were founded on two theories: that proof beyond a reasonable doubt was not required in criminal trials, or that if required in federal criminal trials, that requirement did not extend to criminal trials in state courts. Both of those theories have been soundly and repeatedly rejected by this Court's recent jurisprudence. The Fifth, Sixth and Fourteenth Amendment protections recognized in *Jones, Apprendi, Ring, Blakely,* and *Cunningham* cannot be reconciled with the plurality analysis of *Apodaca/Johnson*, and those decisions can no longer justify allowing criminal convictions by non-unanimous jury polls.

II. Deprivations Of Liberty Based On Non-Unanimous Jury Polls Are Inconsistent With The Protections Of The Fifth, Sixth And Fourteenth Amendment.

A. A Trial By Jury with Proof Beyond A Reasonable Doubt Protects an Accused from Government Oppression and Unreliable Convictions.

America is unique in its recognition of a constitutionally protected right to a jury for any crime which would result in a deprivation of liberty. Leib, Ethan J., *A Comparison of Criminal Jury Rules in Democratic Countries*, 50 OHIO ST. J. CRIM. L. 629, 630

(Spring 2008) ("the United States offers the jury trial much more broadly to criminal defendants than other countries"); Dwyer, William L., *In the Hands of The People*, at xi (St. Martin's Press 2002) ("To visitors from abroad – even to some Americans – the jury is a surprising invention. . . No other modern society has bet so heavily on the common man's and woman's good sense.")

The right to a criminal trial by jury has been one of the least controversial rights guaranteed by our Constitution: the right was included in the First Continental Congress's Declaration of Rights of 1774; of the twelve states that had adopted written constitutions prior to the Constitutional Convention, the right of a criminal defendant to a jury trial was the only right universally guaranteed; and the need to safeguard the right to a trial by jury was one of the "most consistent points of agreement between the Federalists and the Anti-Federalists" at the Constitutional Convention. Alschuler & Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 870-71 (1994). The right of an accused to a jury trial is recognized as necessary to "prevent oppression by the Government." *Duncan v. Louisiana*, 391 U.S. at 155; *see also Apprendi*, 530 U.S. at 477-78 (discussing that the jury has historically been, and is perceived by the public as being, the last bastion between the criminally accused and the power of the state) (citing *United States v. Gaudin*, 515 U.S. 506 (1995)).

While the jury stands between the accused and the government, the "beyond a reasonable doubt"

standard both ensures that the jury will accurately fulfill its responsibilities when deciding the fate of an accused and encourages respect for, and confidence in, the jury's decision:

> The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. As we said in *Speiser v. Randall, supra*, 357 U.S. [513], at 525-526, 78 S. Ct. [1332], at 1342 [(1958)]: 'There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value – as a criminal defendant his liberty – this margin of error is reduced as to him by the process of placing on the other party the burden of * * * persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his

> liberty unless the Government has borne the burden of * * * convincing the factfinder of his guilt.' To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.' Dorsen & Rezneck, *In Re Gault and the Future of Juvenile Law*, 1 FAMILY LAW QUARTERLY, No. 4, pp. 1, 26 (1967).
>
> Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

In re Winship 397 U.S. at 363-364.

The questions becomes whether the jury can fulfill its fundamental functions when the opinion of a significant percentage of its members – 16% – is deemed to be irrelevant.

B. A Lack of Unanimity Fundamentally Alters Jury Deliberation in a Manner that Undermines the Constitutionally Mandated Role of the Jury.

The lack of a unanimity requirements fundamentally impacts the conduct of a jury; empirical evidence documents that failing to require unanimity negatively affects the jury's deliberation process and the accuracy of its fact findings.

Studies of juries that were told they did not have to reach unanimity documented that the juries were less concerned about deliberation and more focused on quickly getting to a verdict; such juries refused to consider the merits of the minority view, they were likely to take the first formal ballot within ten minutes of being seated as a jury, and to continue to vote often until they reached a verdict by the required number. *Revisiting the Unanimity Requirement*, 100 NW. U. L. REV. at 208. In marked contrast, mock juries that were told they had to reach a unanimous verdict delayed their vote until after they had discussed the evidence and rated their deliberations as both more serious and more thorough. *Id.* Other studies document that when unanimity is not required, the opinions of individual jurors are disenfranchised – and members of a minority or women are the most likely to be disenfranchised. Taylor-Thompson, Kim, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1285-87, 1299-1301 (April 2000).

The lack of deliberation has a direct impact on

the quality of the verdict. A lack of deliberation can negatively impact the verdict's accuracy. In one study, individuals called for jury duty were instead asked to sit as mock jurors, and viewed a video of a trial of a case that was intentionally designed by experts not to be sufficient as first degree murder, but instead of a lesser charger. Of the juries that had to deliberate until they reached unanimity, not one jury could reach a unanimous vote of first degree murder; of the juries that were allowed to reach a majority vote, 12% returned a verdict of first degree. *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. at 1273. In short, the juries that had to be unanimous more accurately analyzed the evidence, those that did not have to be unanimous were less likely to do so.

The lack of deliberation also impacts the perception of the jury's role. Juries that are unanimous report great satisfaction and confidence in their verdicts. *Revisiting the Unanimity Requirement*, 100 NW. U. L. REV. at 208. In contrast, the failure to consider all of the opinions on a jury "could undermine public confidence in the fairness of the verdicts." *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. at 1314.

C. There is No Justification for Allowing a Lack of Unanimity in Criminal Juries.

A primary reason for allowing non-unanimous juries is a contention that those who vote "not guilty" are unreasonable, hold-out, jurors simply seeking to cause a hung verdict. *See* Morehead, Jere W., *A "Modest" Proposal for Jury Reform: The Elimination of*

Required Unanimous Jury Verdicts, 46 U. KAN. L. REV. 933, 935 (1998); Comment, *Letting the Supermajority Rule: Nonunanimous Jury Verdicts in Criminal Trials*, 24 FLA. ST. U. L. REV. 659, 675 (1997); Note, *Jury Unanimity in California: Should it Stay or Should it Go?*, 29 LOY. L.A. L. REV. 1319, 1347 (1996).

If such a concern was true, however, one would expect a plethora of hung-juries in every jurisdiction that requires unanimity. There is no reason to believe that the individuals called to state jury service in Oregon are more unreasonable than those jurors called to serve in federal courts in the same jurisdiction, or into every other court in the nation both state and federal. As Oregon has about one-third to one-half of all felony trials decided by non-unanimous jury votes, logically one would expect that one-third to one-half of every criminal case in jurisdictions requiring unanimity to suffer hung juries. In reality, hung juries are rare in all jurisdictions, with analysis finding only 2% of federal trials, and between 4% and 6% of state trials, ending in such verdicts. Reichelt, Jason D., *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror*, 40 U. MICH. J.L. REFORM 569, 582-83 (Spring 2007); *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. at 1287 n.150.

An analysis undertaken through the National Center for State Courts via a grant from the Department of Justice, found that less than 4.8% of federal trials between 1980 and 1997, and an average of 6.2% of state trials between 1996 and 1997, ended in

hung juries. *Are Hung Juries a Problem?* at 19-25.[6] While the authors of the research project considered utilizing non-unanimous juries as a solution, the recommendations rejected that option as not addressing the real problems causing hung juries – which was not unreasonable hold-out jurors:

> But it is also clear from this study that such an approach would address the symptoms of disagreement among jurors without necessarily addressing the actual causes – namely, weak evidence, poor interpersonal dynamics during deliberations, and jurors' concerns about the appropriateness of legal enforcement in particular cases. Moreover, there is empirical support that the introduction of a non-unanimous verdict rule might also affect the jury's deliberation process in unintended ways such as cutting off minority viewpoints before the jury has an opportunity to consider those opinions thoroughly. Solutions that focus specifically on the underlying causes of juror deadlock, rather than on its effects, may prove to be more effective in the long run. Possible remedies include better case selection and preparation by attorneys; better tools for jurors to

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[6] Available at: www.ncsconline.org/WC/Publications/-Res_Juries_HungJuriesProblemPub.pdf.

> understand the evidence and law; and guidance for jurors about how to conduct deliberations.

Id. at 86.

Frequently when a jury is unable to resolve a case, it is because they jury started out significantly divided in their view of the case – not because of a lone, irrational, dissenter. *Standing Alone*, 40 U. MICH. L.J. REFORM at 570-71 (*citing* Devine *et al.*, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 690-707 (2001). Other empirical research confirms that, far from been unreasonable, hold-out jurists in both non-unanimous civil juries and mock criminal trial juries frequently took the same position as taken by the judges who heard the case. *Revisiting the Unanimity Requirement*, 100 NW. U. L. REV. at 229-230. Allowing non-unanimous verdicts does not solve the non-existent problem of unreasonable hold-out jurists, and cannot be justified on that basis.

Another justification cited for allowing non-unanimous juries is that majority vote is quite common in democracy – it is utilized in elections, legislative, and even in appellate judicial proceedings. *See* Amar, Akhil Reed, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1189-90 (1995). Why, then, would it not be reasonable for juries as well? Yet legislatures and judiciaries make prospective laws that bind everyone subject to that law – including the members of the legislature and the judiciary themselves. If the same or a different

legislature, or a different judicial panel, decides that the prior law was inappropriate or somehow mistaken, they can always rectify their action by a new enactment. At no point is a legislature or judicial panel obligated to determine that their enactment is appropriate beyond a reasonable doubt – and few laws could be passed or decisions reached if that was the standard. In marked contrast, the decision of a criminal jury impacts not them, but the defendant, and it cannot be revisited if the same jurors later doubt their decision. Further, the decisions controls the most fundamental interests guaranteed by our constitution – life and liberty. The standard of beyond a reasonable doubt is required to protect these fundamental interests, and a majority rule is simply not compatible with that standard. *See* Primus, Richard A., *When Democracy is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 CARDOZO L. REV. 1417 (January, 1997).

D. The Opinion of 16% of A Properly Constituted Jury Cannot, Constitutionally, Be Dismissed as Unreasonable.

Criminal juries are selected from lists of qualified individuals who make up a venire. These individuals are then questioned to discern any bias or other basis to remove them for cause, and only after each side has exercised its peremptory challenges is the petit panel duly sworn to impartially consider the evidence and apply the law. After hearing all the evidence and instructions, the panel retires to deliberate and reach a verdict. In Oregon and

Louisiana, however, the opinions of 16% of these well qualified jurors are frequently ignored.

For such a conviction to pass constitutional muster under the Sixth and Fourteenth Amendments, this Court must determine that the doubts of these 16% of the jury are necessarily, and always, unreasonable. Neither history, logic, nor empirical research, supports such a determination. As Justice Marshall wrote in dissent, joined by Justice Brennan, in *Apodaca/Johnson*:

> The doubts of a single juror are in my view evidence that the government has failed to carry its burden of proving guilt beyond a reasonable doubt.

406 U.S. at 403.

A common joke in Oregon among the defense bar is that if the classic *Twelve Angry Men* had been filmed here, it would have been a very short film indeed. This Court has rightly refused to apportion a mathematical number for the "beyond a reasonable doubt" standard of proof. *See, e.g., Holland v. United States,* 348 U.S. 121 (1955). Yet that is what Oregon and Louisiana are *de facto* doing, they are setting "beyond a reasonable doubt" as the conclusion of 84% of the jury.

There is simply no support, either in empirical research or at common law, to believe that the doubts of 16% of a properly constituted petit jury panel are always unreasonable. Convictions based on a jury poll

which is not unanimous are convictions attained based on a level of proof lower than beyond a reasonable doubt, and are therefore in violation of the guarantees provided by the Sixth and Fourteenth Amendments.

CONCLUSION

For the reasons presented herein, *amici curiae* join with petitioner in asking this Court to accept *certiorari* on the first question, and determine whether the practice of depriving an individual of their liberty based on a non-unanimous jury poll is in violation of the protections afforded to an accused by the Sixth and Fourteenth Amendments.

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IN THE
Supreme Court Of The United States

DERRICK TODD LEE,
Petitioner,
v.
STATE OF LOUISIANA,
Respondent.

On Petition for a Writ of Certiorari to the Louisiana Court of Appeal, First Circuit

BRIEF OF *AMICUS CURIAE* THE HOUSTON INSTITUTE FOR RACE AND JUSTICE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE [1]

The Charles Hamilton Houston Institute for Race and Justice at Harvard Law School (CHHIRJ) was founded in September 2005 by Charles Ogletree, Jr., Jesse Climenko Professor of Law at Harvard Law School. The Institute continues the unfinished work of Charles Hamilton Houston, one of the Twentieth Century's most talented legal scholars and litigators. Houston helped to engineer the multi-year legal strategy that led to the unanimous decision by this Court in *Brown vs. Board of Education*, 347 U.S. 483 (1954). Sadly, however, he died in 1950, at the age of 54, before he could witness his efforts coming to fruition.

The Charles Hamilton Houston Institute marshals resources to advance Houston's dreams for a more equitable and just society. It brings together students, faculty, practitioners, civil rights and business leaders, community advocates, litigators, and policymakers in a variety of forums, conferences and meetings. The Institute is initially focusing on, among other things, reforming criminal justice policies. *Amicus Curiae* accordingly has a keen interest in having this Court revisit its fractured and historically unsound determination in *Apodaca v. Oregon*, 406 U.S. 404 (1972) and *Johnson v.*

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[1] Pursuant to Rule 37, both parties received notice of the filing of this brief more than 10 days prior to the due date. A letter of consent from each party accompanies this filing. Pursuant to Rule 36, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution to the preparation or submission of the brief.

Louisiana, 406 U.S. 366 (1972), that non-unanimous jury verdicts in criminal cases satisfy the Sixth Amendment's jury trial guarantee. As we demonstrate below, non-unanimous jury verdicts in criminal cases create a qualitatively lesser form of justice and hold the potential to marginalize the views of women and people of color as they fulfill their obligation to serve on juries. Given that the analytical basis for these decisions is fundamentally out of step with this Court's modern Sixth Amendment jurisprudence, to delay resolution of the unanimity question raised in the Petition for Certiorari ("Petition") will perpetuate confusion and facilitate injustice in a substantial number of cases in Louisiana and Oregon, the only two states that continue to permit non-unanimous jury verdicts in criminal cases.

SUMMARY OF ARGUMENT

The Court should grant the Petition to decide the important question of whether the Sixth Amendment, as applied to the states by means of the Fourteenth Amendment, requires unanimity in state criminal cases. The Petition focuses largely on demonstrating why the jurisprudential approach utilized in *Apodaca v. Oregon,* 406 U.S. 404 (1972) and *Johnson v. Louisiana,* 406 U.S. 366 (1972), cannot be squared with the legal analysis the Court has relied upon in recent Sixth Amendment cases such as *Crawford v. Washington*, 541 U.S. 36 (2004), *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Pet. at 11-18. Petitioner is correct that the disparity between the approach taken by the Court in the *Apodaca* and *Johnson* decisions—in which a

centuries-old tradition of jury unanimity was swept aside based on judicial estimates about the functional importance of the unanimity requirement—and the approach to the Sixth Amendment taken by the Court in recent cases creates considerable legal uncertainty about the validity of criminal jury verdicts in jurisdictions like Louisiana and Oregon. *Amicus Curiae* fully supports Petitioner's argument that certiorari should be granted to address the continued viability of *Apodaca* and *Johnson* in light of the modern Sixth Amendment approach adopted in cases like *Crawford*, *Gonzalez-Lopez* and *Apprendi*.

Amicus writes separately to emphasize the practical necessity of granting the Petition. This necessity stems from the fact that, setting aside whether the *Apodaca* Court should have engaged in a functional analysis at all, the Court's conclusion with regard to the supposedly minimal importance of the unanimity requirement has now been cast into grave doubt by a generation of empirical research on jury decision making.

According to the Court in *Apodaca*, there is no functional difference between a unanimous jury verdict and a verdict rendered by a vote of 11 to one or 10 to two. *Apodaca*, 406 U.S at 410-11. If this were correct, then the question presented by the Petition would be largely an academic one. However, empirical research conducted over the past 35 years has demonstrated that the unanimity requirement matters significantly because it fundamentally alters the jury dynamic. In short, it is now apparent that there is a real difference between trial by jury in Louisiana and Oregon, and the traditional jury trial

guarantee that existed at the time of the Founding and is still applied elsewhere throughout the Nation.

In particular, as we discuss in detail below, modern empirical research has demonstrated that unanimous juries are more careful, more thorough, and return verdicts that are more in line with what experienced observers of the criminal justice system (generally judges) view to be the correct verdict. Unanimous juries are, in other words, demonstrably more reliable. In addition, and of critical concern to *Amicus Curiae*, the historic unanimity requirement ensures that the viewpoints of *every* juror are carefully considered by fellow jurors, and the resulting unanimous verdict is viewed as more legitimate by all members of the Community.

By contrast, eliminating the traditional unanimity requirement has been shown to produce a situation in which a majority of jurors can marginalize the viewpoints of other jurors by refusing to deliberate further once the majority threshold has been reached. This concern applies to all juries and all jurors, but its effects can be particularly stark when those holding minority viewpoints are historic victims of discrimination, including women, people of color and religious minorities. In such cases, a state law provision permitting non-unanimous criminal verdicts can serve as a *de facto* means of allowing majorities of jurors to prevent minority jurors from jury participation, thereby undermining important Constitutional principles regarding equality in jury service that this Court has taken considerable measures to protect in recent years.

Although the arguments discussed at length in the Petition demonstrate why the question presented is worthy of the Court's attention, the empirical evidence on jury decision making shows why it is critical that this Court confront the question now. The traditional unanimity requirement serves as a basic component of the Sixth Amendment's jury guarantee, which is not currently being afforded to accused persons in Louisiana and Oregon. The Court's corrective intervention is urgently needed.

ARGUMENT

Although systematic empirical research on jury decision making began in 1953 with the initiation of the Chicago Jury Project, *see* Dennis J. Devine *et al.*, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psych., Pub. Pol. & L. 622, 623 (2001), and although the Court, in part, relied on some of the early research in *Apodaca*, 406 U.S. at 411 n.5,[2] most of the empirical research on jury dynamics has occurred in the past 35 years. Indeed, the Court's decisions in *Apodaca* and *Johnson* themselves spawned interest in research on factors affecting jury decision making. *See* Devine *et al.*, *supra*, at 623. The empirical studies conducted since *Apodaca* have cast doubt on the plurality's reasoning with regard to the purported functional

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[2] The Devine article is "a comprehensive review of the empirical research on jury decision making published between 1955 and 1999." Devine *et al.*, *supra*, at 622. It compiles and organizes data from 206 studies involving actual and mock juries, studying several variables, including rule of decision, and it identifies common themes throughout the studies. *Id.*

equivalence of unanimous and non-unanimous juries.[3]

A. Empirical Research Has Shown That Juries Required to Act Unanimously are More Thorough than Non-Unanimous Juries

Studies comparing the quality of the deliberation of unanimous juries with non-unanimous juries have consistently found that non-unanimous juries are less thorough. *See* Reid Hastie, Steven D. Penrod & Nancy Pennington, *Inside the Jury*, 85 (1983) (finding that the farther the jury gets from a unanimity rule, the fewer key categories of evidence are discussed).[4] In addition, non-unanimous juries

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[3] *See* Devine *et al.* 7 Psych., Pub. Pol. & L. at 669 (summarizing numerous studies); Reid Hastie, Steven D. Penrod & Nancy Pennington, *Inside the Jury*, 227-233 (1983) (supporting unanimity in criminal trials); Shari Seidman Diamond, Mary B. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The behavior of the non-unanimous civil jury*, 100 Nw. U. L. Rev. 201, 229-30 (2006) (questioning assumptions in *Apodaca* and related cases and recommending unanimous juries in civil cases).

[4] The study examined the effects of the rule of decision on jury performance using an "experimental method employ[ing] an extremely realistic but highly controlled simulation of the jury decision task." Hastie *et al.*, *supra*, at 13. The study took place in actual courthouses, used existing court personnel, and used the actual jury pool as subjects. *Id.*

The Hastie study asked citizens called for jury duty in Massachusetts trial courts to participate in a mock *voir dire*, after which they were separated into 69 juries. Hastie *et al.*, *supra*, at 60. The jurors then watched a film of a three-hour reenactment of a murder trial. *Id.* at 46. After viewing the reenactment, the jury was instructed by a judge and then asked to retire to deliberate. *Id.* at 50-51. Before the start of

take fewer polls and take less time to reach a verdict than do unanimous juries. Devine *et al.*, *supra*, at 669 (summarizing several studies). *See also* Reid Hastie, Steven D. Penrod & Nancy Pennington, *Inside the Jury*, 76 (1983) (indicating that unanimous juries deliberate longer than non-unanimous juries, and that this result is consistent across all studies examining the decision rule). In addition, non-unanimous juries also tend to cease deliberations when the required quorum is reached. Devine *et al.*, *supra*, at 669.

The idea that the limited deliberations of non-unanimous juries affect deliberation quality is reflected in the way jurors perceive the deliberations. Jurors serving on unanimous juries uniformly report being more satisfied with the deliberations and more confident that the jury came to the right verdict. Devine *et al.*, *supra*, at 669. *See also* Reid Hastie, Steven D. Penrod & Nancy Pennington, *Inside the Jury*, 82 (1983) (indicating that non-unanimous juries have lower rates of satisfaction with the quality of the deliberation and the validity of the verdict as compared with unanimous juries).[5] Non-unanimous juries also report lower ratings of the performance

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deliberation, the jurors filled out a questionnaire asking which verdict they would choose if they had to decide at that time. *Id.* at 51. After deliberations, the jurors filled out post-deliberation surveys. *Id.* at 52-53. The 69 juries were separated into three groups of 23 juries each, divided by decision rule, with one group having reach a unanimous verdict, one group could reach a verdict if ten out of twelve jurors agreed, and the other group could reach a verdict if eight of twelve agreed. *Id.* at 59-60.

[5] Jurors on-unanimous juries also report having a relatively negative view of their fellow jurors' open-mindedness and persuasiveness as compared with jurors on unanimous juries.

and decision processes of the other jurors. Hastie *et al.*, *supra*, at 76; Shari Seidman Diamond, *et al.*, *supra*, at 205.

Perhaps the most important consideration in examining the effect of the decision rule is whether the rule of decision affects the outcome of deliberations. Studies have shown a limited, but significant, effect of the decision rule on the outcome of jury deliberations, though these effects depend on other factors such as the strength of the evidence. Devine *et al.*, *supra*, at 669. Accordingly, the rule of decision affects the outcome of jury deliberations in close cases—that is, those cases in which the prosecutor's case is neither particularly weak nor strong. *Id.*[6]

Researchers have also studied how the decision rule affects verdict outcome. One element of the deliberative process that has been examined is the amount of deliberation that occurs in twelve-person juries after the majority faction reaches eight jurors. Hastie *et al.*, *supra*, at 95. In 10-2 quorum juries, 10% of the jury's total deliberation time takes place after the majority faction reaches eight jurors, as compared with 20% in unanimous juries. *Id.* at 95-96.[7] There is also evidence that this last 20-30

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[6] Devine *et al.* also reviewed studies finding that whether the jury was unanimous had "little or no impact" on jury deliberations, but those studies had "methodological weaknesses, such as little or no variance in jury verdicts, severe deliberation time limits, and small samples." Devine *et al.*, *supra*, at 669.

[7] Non-unanimous juries also reach the eight-juror majority faster than do unanimous juries. Hastie *et al.*, *supra*, at 113.

minutes of deliberation can be outcome determinative. In almost a third (seven) of the unanimous juries monitored in the Hastie *et al.* study, the verdict initially favored by the eight-juror majority was not the verdict delivered by the jury. *Id.* at 96.[8] In addition, almost 30% of the requests for information from the trial judge, a quarter of the corrections of the evidentiary or legal errors made during deliberation, and over one-third of the discussions of the reasonable doubt standard occurred during the period after an initial eight-juror majority had been established. *Id.*

Though the same number of juries under each of the three decision rules delivered the "correct" verdict of second-degree murder, *see* Hastie *et al.*, *supra*, at 59-60, the study yielded two significant results –a statistically significant increase in the number of hung juries under the unanimity rule, and a statistically significant number of "incorrect" first-degree murder verdicts under the 10-2 majority rule. *Id.* at 60.[9] The research suggests, then, that this result is somewhat normative; the hung juries under the unanimity rule seem to prevent the "wrong"

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[8] Three juries hung, and of the remaining four, two switched from second-degree murder to manslaughter and two switched, respectively, from first-degree murder and manslaughter to second-degree murder. *Id.* at 96.

[9] Though picking the "right" verdict is impossible, second-degree murder was considered the "right" verdict because it was the verdict delivered at the original trial, and legal experts who viewed the reenactment largely agreed that second-degree murder was the proper verdict. Hastie *et al.*, *supra*, at 62. The three hung juries under the unanimity rule would have also delivered the "wrong" verdict if the majority faction had prevailed. Hastie *et al.*, *supra*, at 63.

result from occurring. *Id.* Also, when unanimous juries did come to the "wrong" result their verdicts were often less harsh than those delivered by non-unanimous juries which tended to deliver excessively harsh verdicts. *See id.* at 102.

Another factor that has been studied is the time taken between votes as a function of the decision rule. Unanimous juries took more time to deliberate between votes than did non-unanimous juries. Hastie *et al.*, *supra*, at 90. This greater length of time between votes is associated with the "integrative evidence-driven" deliberation style, while the shorter length of time between votes in the non-unanimous juries is attributed to the "discounting verdict-driven deliberation style." Hastie *et al.*, *supra*, at 90. *Accord* Shari Seidman Diamond, *et al.*, *supra*, at 208. The evidence-driven deliberation style is adopted most often by juries in cases where the ultimate verdict was decided more by the deliberative process than by the positions of the jurors before deliberations began. Devine, *et al. supra*, at 701.

The decision rule has a demonstrated effect on the quality of deliberations and the way deliberations are perceived. Perhaps most importantly, the decision rule appears to have an effect on the accuracy of the delivered verdict. The research suggests that unanimous juries provide a normative advantage over non-unanimous juries.

B. Valid Minority Opinions Can Be Easily Marginalized when Unanimity is not Required

The *Johnson* majority concluded that changing the rule of decision would have little or no effect on

the consideration given to the viewpoints of the minority jurors in a quorum jury and that the strength of the deliberations would not be significantly diluted. *Johnson*, 406 U.S. at 361. The research contradicts this conclusion. Instead, the research indicates that eliminating unanimity reduces both the quality of juror deliberations and juror satisfaction with those deliberations. The research also indicates that while jurors extensively debate the issues in both unanimous and quorum juries, the jurors' knowledge that they do not have to resolve all disagreement to reach a verdict in quorum juries often leads to "dismissive" treatment of minority jurors whose votes are not needed to reach a verdict. Shari Seidman Diamond, *et al.*, *supra*, at 205. Indeed, one study found that juries with eventual holdouts were twice as likely to mention the quorum rule early in deliberations as were juries that ended up delivering a unanimous verdict, and in 40% of the juries studied, the jurors highlighted the quorum requirement before or during the first vote. Shari Seidman Diamond, *et al.*, *supra*, at 214.[10]

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[10] The Seidman Diamond study reviewed videos of the deliberations of 50 actual civil juries in Arizona. Shari Seidman Diamond, *et al.*, *supra*, at 210-12. The 50 case sample contained 26 motor vehicle cases, 17 non-motor vehicle tort cases, 4 medical malpractice cases, and 3 contract cases. *Id.* at 211. Arizona civil juries consist of eight jurors, six of whom must agree in order to reach a verdict. *Id.* at 205. Thirty-three of the 50 juries reached unanimous verdicts on all claims, one case resulted in a hung jury, and the other 16 juries reached verdicts with at least one holdout. *Id.* at 212. Five of the 16 cases ended with a single holdout juror, while 11 of the cases either had two holdouts for one position (8), or two holdouts, each of whom had a different position (3).

There is evidence to suggest that when deliberations are cut off prematurely based on majority reliance on the quorum rule the reliability of the verdict suffers. In several cases, the result favored by the minority jurors was the same as the result favored by the judges in those cases. *See* Shari Seidman Diamond, *et al.*, *supra*, at 222.[11] Evidence also suggests that unanimity is central to the legitimacy of jury verdicts. *See* Shari Seidman Diamond, *et al.*, *supra*, at 227 (citing research indicating that "community residents viewed unanimous procedures for arriving at jury verdicts in criminal cases as more accurate and fairer than majority procedures").

In addition to raising concerns about the accuracy and perceived legitimacy of verdicts reached by non-unanimous juries, such juries also raise concerns that the views of racial and ethnic minorities and women may be marginalized. Though the Court has proscribed exclusion of people of color, *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880), and women, *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975), from juries, research indicates that a quorum decision rule may contribute to a *de facto* exclusion of their viewpoints. Kim Taylor-Thompson, *Empty Votes In Jury Deliberations*, 113 Harv. L. Rev. 1261, 1264 (Apr. 2000). The data indicate that women and minorities are underrepresented on juries. Taylor-Thompson, *supra*, at 1276-77, 1298 (citing evidence that women and people of color are underrepresented

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[11] In the study, the judges presiding over the 50 reviewed cases filled out questionnaires in which they were asked to reveal what they thought to be the proper verdict after having heard the evidence. Shari Seidman Diamond, *et al.*, *supra*, at 222.

in the venire and on juries, and that prosecutors disproportionately use peremptory strikes on people of color, despite the prohibitions of *Batson v. Kentucky*, 476 U.S. 79 (1986)). It also cannot be ignored that the Louisiana Constitutional provision permitting non-unanimous juries was adopted as part of the 1898 Louisiana Constitutional convention—the same convention that adopted various Jim Crow provisions specifically intended to limit African American participation in the democratic process and to "perpetuate the supremacy of the Anglo-Saxon race in Louisiana." *See* Constitutional Convention of the State of Louisiana, Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana 380-81 (H.J. Hearsey, 1898).[12]

While the underrepresentation of women and people of color on juries is no guarantee that they will end up in the minority faction of a quorum jury, *see*

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[12] When discussing the provisions adopted to prevent African American suffrage, one delegate to the convention stated as follows:

> [T]he Supreme Court of the United States in the Wilson case, referring to that, said that they had swept the field of expedients, but they were permissible expedients, and that is what we have done in order to keep the negro from exercising the suffrage. What care I whether the test we have put be a new one or an old one? What care I whether it be more or less ridiculous or not? Doesn't it meet the case? Doesn't it let the white man vote, and doesn't it stop the negro from voting, and isn't that what we came here for? (Applause)

Constitutional Convention of the State of Louisiana, *supra*, at 380.

Hastie *et al.*, *supra*, at 149; Shari Seidman Diamond, *et al.*, *supra*, at 220 (finding that there are no personal demographic characteristics that differentiate holdouts from the other jurors), there are indications in the data that suggest that *de facto* exclusion of underrepresented groups is an important concern. For example, race and gender are negatively correlated with juror persuasiveness and deliberation performance. *See* Hastie *et al.*, *supra*, at 149 (finding that to the extent the juror has characteristics or experiences that are negatively linked to deliberation performance and juror persuasiveness, the more likely the juror is to be a holdout). *See also* Taylor-Thompson, *supra*, at1298-99 (citing studies observing that women speak less than do men during deliberations, and that men often interrupted the women and ignored their arguments). These factors indicate an increased likelihood that women and people of color may end up being outvoted by the majority on a non-unanimous jury.

Any marginalization of women and people of color from juries created by a quorum rule of decision may have collateral consequences for racial and ethnic minority defendants and crime victims. For example, a 1996 study found that when the prosecutor's evidence was weak, majority white juries were more likely to convict black defendants than were majority black juries. Devine *et al.*, *supra*, at 673-74. In addition, the verdicts of the majority white juries were harsher than those of the majority black juries. *Id.* Other studies have found that majority white juries are similarly punitive when the defendant is Latino. Taylor-Thompson, *supra*, at 1293 (citing Dolores A. Perez, *et al.*, *Ethnicity of Defendants and Jurors as Influences on Jury*

Decisions, 23 J. Applied Soc. Psych., 1249, 1249 (1993)). In addition, interviews conducted with 360 actual jurors for rape trials in Indianapolis revealed that the mostly middle-class white jurors tended to disbelieve African American rape complainants. Taylor-Thompson, *supra*, at 1294 (citing Gary D. LaFree, *Rape and Criminal Justice: The Social Construction of Sexual Assault*, 155-55, 200-01 (1989).

In *Ballew v. Georgia*, 435 U.S. 223, 236-37 (1978), the Court stated that "meaningful community participation cannot be attained with the exclusion of minorities or other identifiable groups from jury service. 'It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.'" *Id.* (citing *Smith v. Texas*, 311 U.S. 128, 130 (1940)). In addition, part of the Court's rationale in examining the role of jury size on verdict outcome was to minimize "imbalance[s] to the detriment of one side, the defense." *Ballew v. Georgia*, 435 U.S. 223, 236 (1978). The Court has also made significant efforts in recent years to ensure that jurors are not excluded from jury participation on the basis of their race or gender. *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127 (1994); *Miller-El v. Dretke*, 544 U.S. 660 (2005) and *Snyder v. La.*, 128 S. Ct. 1203 (2008). The evidence suggests that to the extent the views of women and people of color are marginalized within them, non-unanimous juries undermine these important constitutional principles.

C. The Myth of the Eccentric Holdout Juror

The one principal argument made in favor of dispensing with the traditional unanimity requirement is that the unanimity rule allows an eccentric holdout juror to subvert the will of a principled majority. *See* Shari Seidman Diamond, Mary B. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The behavior of the non-unanimous civil jury*, 100 Nw. U. L. Rev. 201, 204 (2006) (citing critics of unanimity who claim that quorum juries protect the jury from the "obstinacy of the erratic or otherwise unreasonable holdout juror"); Note: James Kachmar, Silencing the Minority: Permitting Nonunanimous Jury Verdicts in Criminal Trials, 28 Pac. L. J. 273, 299 (1997) (citing cases in which a single holdout juror irrationally hung a criminal jury). The research shows that this concern is unfounded. Shari Seidman Diamond, *et al.*, *supra*, at 205 (finding no evidence that outvoted holdouts are irrational or eccentric in ways that justify isolating them or failing to seriously consider their views).

To begin with, juries rarely hang. Numerous studies indicate that 90% of the time, the jury's final verdict was that favored by the majority of the jury at the outset of deliberation. Devine *et al.*, supra, at 690. This result appears to be linked to the size of the majority at the beginning of deliberations—majorities of two-thirds or more usually prevail, while weak majorities are more likely to hang (or acquit, presuming that the original majority was to convict). *Id.*

In addition, initial two-thirds majorities favoring conviction succeeded in obtaining a guilty verdict 67% of the time, while two-thirds majorities favoring acquittal won 94% of the time. Devine *et al.*, *supra*, at 691. The largest increase in success rate for conviction majorities occurs, in 12-person juries, between 10-2 and 11-1, whereas the success rate for acquittal majorities increases the most between 8-4 and 9-3. Devine *et al.*, *supra*, at 692.[13] The data indicate that if seven or fewer jurors favor conviction at the beginning of deliberation, the jury will probably acquit. If ten or more jurors favor conviction, the jury will probably convict. At eight or nine jurors supporting conviction, the outcome becomes more difficult to predict. *Id.* In any event, it is clear that not only are hung juries rare, the 11-1 hung jury is even rarer. Indeed, contrary to the common stereotype of the jury stymied by a lone holdout, studies have shown that juries are usually hung either by two large factions or several smaller factions. Hastie *et al.*, supra, at 166. *See also* Shari Seidman Diamond, *et al.*, *supra*, at 207 (citing findings from the National Center of State Courts finding that 58% of hung juries in criminal cases ended with at least three holdouts).

In addition to hung juries being unlikely, the research shows that the fears of the irrational holdout juror are unfounded. Indeed, there are no personal demographic characteristics that

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[13] If hung juries are factored out of the analysis, the greatest increase in success rate for conviction majorities is between 8-4 and 9-3; for acquittal, a majority is not even necessary, as the greatest increase in success rate occurs when the acquittal faction is greater than four. Devine *et al.*, *supra*, at 692.

differentiate holdouts from the other jurors. Hastie *et al.*, *supra*, at 149; Shari Seidman Diamond, *et al.*, *supra*, at 220. Further, the holdouts viewed the judge's instructions in much the same way as the majority jurors, and their recall of the testimony and of the elements of the offenses did not differ from that of the majority. Hastie *et al.*, *supra*, at 149. *See also* Shari Seidman Diamond, *et al.*, *supra*, at 220 (finding that holdouts and majority jurors largely agreed about the content of the evidence).

Other than extreme disagreement with the majority's choice of verdict, the main difference between the holdouts and the majority was that the holdouts had a significantly lower perception of the seriousness and thoroughness of the deliberations. Hastie *et al.*, *supra*, at 149; Shari Seidman Diamond, *et al.*, *supra*, at 225. This negative perception appears to be linked to deliberation performance, which is, in turn, linked to education, occupation, income, gender, and juror persuasiveness. Hastie *et al.*, *supra*, at 149. The more a juror's characteristics or experiences are negatively linked to deliberation performance and juror persuasiveness, the more likely the juror is to be a holdout. *See id.*[14]

To summarize, a perceived cost of unanimity is the slight increase in hung juries that results from the rule. The data ameliorate this concern. In contrast, one additional decision rule cost the data support is the cost associated with the marginalization of the minority voice attendant to the

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[14] Even when there was a lone holdout, that person was likely to be a person who refused to participate in the deliberations. Hastie *et al.*, *supra*, at 166.

quorum rule. This problem becomes even more acute when the marginalized minority is composed of individuals from underrepresented groups.

D. The Court's Decisions In Apodaca and Johnson Undermine A Critical Portion of the Jury Trial Guarantee And Make This Court's Intervention Imperative

There can be no serious question that when the Framers adopted the jury trial guarantee, they did so with a *unanimous* jury in mind. At the time when *Apodaca* and *Johnson* were decided, the importance of this time-honored procedural mechanism may not have been apparent to the Court. In light of a generation of empirical research, however, the importance of the unanimity requirement is now undeniable. Unanimous juries protect the quality and integrity of the verdict, ensure full participation of all jurors, and prevent marginalization of the views of underrepresented groups. Non-unanimous juries, as a practical matter, constitute a very different deliberative body than the one the Framers of the Sixth Amendment had in mind. *Amicus Curiae* respectfully requests that the Court grant the Petition in order to address whether the *Apodaca* and *Johnson* Courts properly interpreted the Sixth Amendment jury trial guarantee to permit non-unanimous juries, unknown at the time of the Founding.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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No. 07-1523

IN THE
SUPREME COURT OF THE UNITED STATES

DERRICK TODD LEE,
Petitioner,

versus

LOUISIANA
Respondent.

On Petition for Writ of Certiorari

To the Louisiana Supreme Court

BRIEF OF *AMICUS CURIAE* THE LOUISIANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The Louisiana Association of Criminal Defense Lawyers (LACDL) is a voluntary professional organization of private and public defense attorneys practicing in the state of Louisiana.[1] LACDL counts among its members the vast majority of the criminal defense bar in Louisiana. LACDL's mission includes the protection of individual rights guaranteed by the Louisiana and United States Constitutions and, occasionally, acting as *amicus curiae* in cases where the rights of all are implicated. The LACDL is, from time to time, invited by the Louisiana Supreme Court to submit briefs as *amici* in appropriate cases.

The Petition before the Court raises critically important issues that implicate basic trial rights. Members of *amicus curiae* represent clients whose interests are gravely affected by these issues.

SUMMARY OF ARGUMENT

Louisiana's majority verdict system was first introduced in the state's 1898 Constitution, which contained a raft of measures specifically designed to "establish the supremacy of the white race."

Most of those measures have since been abandoned or struck down. However, the majority

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae certify that no counsel for a party authored this brief in whole or in part, and that no person or party, other than the amicus curiae, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief. The parties have consented to the filing of this amicus brief.

verdict system continues to undermine the participation of African Americans in the administration of criminal justice in this state and to tarnish the legitimacy of jury verdicts.

The pernicious effect of non-unanimous jury verdicts amplifies and is itself exacerbated by the racially discriminatory use of peremptory challenges. Discriminatory intent can be masked by accepting one or two African-American jurors in the knowledge that their vote will not be fully effective in a system of majority verdicts. Equally, discriminatory use of peremptory challenges can more easily ensure that African-American jurors are denied effective voting power when prosecutors need only ten votes to convict.

The pernicious effect of majority verdicts is particularly troubling given the impact of jury verdicts on the African-American population in this state. Louisiana has the highest incarceration rate in the country. The burden of this imprisonment policy is borne disproportionately by African Americans who make up 70% of sentenced prisoners but less than one-third of the overall population.

In sum, the system of majority verdicts in Louisiana operates to undermine the twin goals of community participation and legitimacy that form a critical part of our jury system.

Furthermore, as the drafters of the 1898 Constitution were no doubt aware, where a group forming a majority in the community can elect both the District Attorney and the judge in a parish and then form an effective quorum on the jury, the jury no longer operates effectively as a check on oppression by the government.

ARGUMENT

I. Louisiana's majority verdict system was introduced in 1898 by a Constitution explicitly designed to disenfranchise the African-American population and enshrine white power.

By the Act of 1805, the Territory of Orleans adopted the forms and procedures of the common law of England in its criminal proceedings, including "the method of trials." Act of 1805, § 33; *See generally* A. Voorhies, *A Treatise on the Criminal Jurisprudence of Louisiana*, Bloomfield & Steel (1860), pp.3-10.

When the Territory became the State of Louisiana in 1812 a savings clause was inserted in the Constitution of 1812 to ensure that the existing laws of the Territory would continue in effect until altered or abolished by the legislature. La. Const. of 1812, art. 14, § 11.

At the same time, perhaps as a result of French distrust of a system of laws not specifically articulated by the legislature,[2] the Constitution of 1812 and successive constitutions[3] provided that the legislature could not adopt any system or code of laws by general reference but must specify the several provisions of the law it enacted. La. Const. of 1812, art. 14, § 11

While these Louisiana Constitutions barred the legislature thenceforward from simply adopting the remainder of the common law of England, this

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[2] *See* Judith Schafer, *The Long Arm of the Law: Slave Criminals and the Supreme Court in Antebellum Louisiana*, 60 Tul. L. Rev. 1247, 1248-49 (1986).

[3] La. Const. of 1945 and 1852.

proscription was not retroactive. The adoption of criminal definitions and procedures under the common law of England by the Act of 1805 was held to continue in force by operation of the savings clause. *State v. Lacombe*, 12 La. Ann. 195 (La. 1857). As a result, the common law requirement of unanimity in jury determinations in criminal cases applied in full in the State of Louisiana from its inception.

Following the Civil War and pursuant to the Military Reconstruction Act of 1867, a Constitutional Convention was convened in Louisiana.[4] The 1868 Constitution enshrined Louisiana's first Bill of Rights, which was modeled on the Federal Constitution and included the right to trial by jury. La. Const. of 1868, art. 6.

Following the reconstruction Constitutions and upon the withdrawal of federal troops, new Constitutions were promulgated in 1879 and 1898.

In the Constitution of 1898, jury trial was abolished for misdemeanors, reduced to trial by a jury of five for lesser felonies, and the requirement of unanimity was removed for all save capital offenses. In cases where hard labor was a necessary punishment, defendants were to be tried before a jury of twelve, requiring only nine to concur to render a verdict:

> The General Assembly shall provide for the selection of competent and intelligent jurors. All cases in which the punishment

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[4] Delegates were elected, with forty-nine white and forty-nine black delegates participating and producing a Constitution that was ratified by popular vote in 1868. W. Billings & E. Haas, *In Search of Fundamental Law: Louisiana's Constitutions*, 1812-1874, The Center for Louisiana Studies (1993).

> may not be at hard labor shall, until otherwise provided by law, which shall not be prior to 1904, be tried by the judge without a jury. Cases in which the punishment may be at hard labor shall be tried by a jury of five, all of whom must concur to render a verdict; cases in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom concurring may render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict.

La. Const. of 1898, art. 116.

The move to non-unanimous verdicts applied only to offenses committed after the adoption of the 1898 Constitution. *State v. Ardoin*, 51 La. Ann. 169 (La. 1899).

Louisiana's 1898 Constitution, like the Alabama Constitution of 1901 previously examined by this Court, "was part of a movement that swept the post-Reconstruction South to disenfranchise blacks." *Hunter v. Underwood*, 471 U.S. 222, 229 (1985). *See also* W. Billings & E. Haas, *In Search of Fundamental Law: Louisiana's Constitutions*, 1812-1874, The Center for Louisiana Studies (1993), pp. 93-109.

In his opening address, the President of Louisiana's 1989 Convention,[5] E.B. Kruttschnitt, captured the tone, stating:

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[5] The 134 Convention delegates were all white and, with the exception of one Republican and one Populist, were all Democrats. Billings & Haas, *supra*, at 98-99. A referendum had been employed to call the Convention and elect delegates but with a newly introduced literacy test, black voter

> I am called upon to preside over what is little more than a family meeting of the Democractic party of the State of Louisiana.
>
> * * * *
>
> We know that this convention has been called together by the people of the State to eliminate from the electorate the mass of corrupt and illiterate voters who have during the last quarter of a century degraded our politics.

Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana, 8-9 (1898) [hereinafter "*Journal*"].

In closing the Convention, Hon Thomas J. Semmes stated that the "mission" of the delegates had been "to establish the supremacy of the white race in this state." *Id.* at 374. In his closing remarks President Kruttscchnitt bemoaned that the delegates had been constrained by the Fifteenth Amendment such that they could not provide what they would have wished: "universal white manhood suffrage and the exclusion from the suffrage of every man with a trace of African blood in his veins." *Id.* at 380. He went on to proclaim:

> I say to you, that we can appeal to the conscience of the nation, both judicial and legislative and I don't believe that they will take the responsibility of striking down the system which we have reared in order to protect the purity of the ballot box and to perpetuate the supremacy of the Anglo-Saxon race in Louisiana.

Id. at 381.

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registration dropped by 90% to approximately 13,000 statewide. Billings & Haas, supra, at 98.

By the end of its work, the Convention had produced a Constitution built around article 197, the infamous suffrage provision that enshrined literacy testing and property ownership requirements while exempting most whites from these requirements through its Grandfather Clause.

The Convention substantially diminished the right to jury trial, most importantly for present purposes, by introducing majority verdicts. While the elimination of misdemeanor juries and the reduction of jury size for lesser felonies were said by their proponents to be driven by a desire to reduce costs, commentators have directly linked the diminution of the jury trial right to the general effort "to consolidate Democratic power in the hands of the 'right people,' thereby bypassing the poorer sorts, just as the suffrage provision did." Billings & Haas, *supra*, at 106, fn. 46.

The 1898 Constitution was not submitted to popular vote but simply ratified by the delegates.

The non-unanimity provision introduced in 1898 was rolled over into subsequent Louisiana Constitutions without apparent debate or particular consideration.

In 1972, in a deeply divided opinion, this Court upheld the Constitutionality of non-unanimous jury verdicts with the deciding vote of Justice Powell cast in favor of state's rights, rather than the model of incorporation settled upon by the remainder of the Court. *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972).

In 1973, Louisiana held its most recent Convention, producing our current Constitution, including art. 1, § 16, the provision at issue in the present proceeding. At this Convention majority verdicts were discussed but the debate centered

almost exclusively on the move from a verdict based upon nine out of twelve to a requirement of ten out of twelve votes. This change was presented on the express basis that notwithstanding this Court's ruling in *Johnson*, a vote of nine out of twelve did not comport with the need to establish guilt beyond a reasonable doubt. *Record of the Louisiana Constitutional Convention of 1973: Convention Transcripts, Louisiana Constitutional Convention Records Commission*, vol. 7, 1184.

The transcripts do not disclose any consideration of abolishing majority verdicts nor any weighing of their advantages and disadvantages. It was simply observed that "[I]t leads to a situation where you'll get a definitive action in more cases rather than a hung jury," *id.* at 1188. Louisiana's use of majority verdicts was described as:

> one of the modernizations of our criminal procedure, quite frankly of which Louisiana is one of the leaders in the field.

Id.

Thirty-five years since the Convention, thirty-six years since majority verdicts were ratified by this Court and 110 years since they were introduced in Louisiana in a deliberately racist Constitution, it can be fairly put that Louisiana is a maverick, rather than a leader in this field.

Whatever the intent of the Convention delegates in 1973, Louisiana's provision for majority verdicts appears to have originally been motivated by a desire to disempower African Americans on account of race and, as discussed below, it continues to this day to have that effect.[6]

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[6] Cf. *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) ("Without deciding whether § 182 would be valid if enacted today without

II. The combination of majority verdicts and the discriminatory use of peremptory challenges exponentially increases the negative effect of each on meaningful African-American participation in jury decision making.

The system of majority verdicts in Louisiana creates the inherent risk that the voices of African Americans on the jury will not be respected, will not form a meaningful part of the deliberations and may even be completely ignored. Majority verdicts create an opportunity for other jurors to return the verdict of their choosing while ignoring or discounting the views of minority jurors.

This dilution of meaningful African-American participation in jury service and jury decision making is exponentially worsened when combined with the discriminatory use of peremptory challenges by prosecutors.

The LACDL has previously filed an *amicus* brief in this Court detailing the extensive problems with the enforcement of *Batson* in Louisiana and describing evidence of the systemic use of peremptory challenges to exclude African Americans from jury service in this state. *Snyder v. Louisiana*, No. 06-10119 (U.S. filed May 18, 2007).

Within a system of majority verdicts it becomes easier to conceal discriminatory intent in the use of peremptory challenges and the impact on jury

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any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such, it violates equal protection under Arlington Heights.")

participation by African Americans becomes even more dramatic.

Where a prosecutor minded to discriminate knows that he or she need only secure ten out of twelve votes to obtain a conviction there is an opportunity to include one or two token African-American jurors.[7] This strategy was observed by the Louisiana Supreme Court in the case of a particularly obvious *Batson* violation:

> Moreover, the presence of two black persons on defendant's jury did not necessarily defeat an inference of discrimination. Because only ten votes were needed to convict defendant of armed robbery, the prosecutor could have assumed, contrary to *Batson*'s admonition that it was unacceptable to do so, that all black jurors would vote on the basis of racial bias and then purposefully discriminated by limiting the number of blacks on the jury to two.
>
> * * * *
>
> The record in this case strongly suggests that the prosecutor, already frustrated in defendant's first trial by a hung jury which included three blacks, pursued a strategy in the second trial of limiting the number of blacks on the jury to two, thus making a conviction possible even if all of the blacks on the jury voted according to racial bias.

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[7] The plurality in *Apodaca* was unwilling to accept that members of a minority group may not be adequately heard or represented in deliberations directed to achieving a majority verdict, rather than unanimity. *Id.* at 413-4. As illustrated in *Collier* (*infra*), at least some of those experienced in trying cases under a majority verdict system take the opposite view.

> This pattern of striking all black jurors (except two) continued in the face of mounting pressure by the trial court to select a jury more representative of the black population of the parish.

State v. Collier, 553 So. 2d 815, 819-20 & 823 (La. 1989) (footnotes omitted). *See also State v. Cheatteam*, 07-272, 2008 La. App. LEXIS 816 (La. App. 5 Cir. May 27, 2008)("[Defense counsel] pointed out that it appeared the prosecutor was attempting to ensure that only two African-Americans would serve on the jury. And in order to convict, the prosecutor needed only 10 votes."); *State v. Davis*, 626 So. 2d 800 (La. App. 2 Cir. 1993) (State struck four of six African-American jurors, 10:2 guilty verdict returned, *Batson* challenge denied).

Where the discriminatory use of peremptory challenges winnows down the number of African Americans to serve on a particular jury to one or two, the inherent potential of the majority verdict system to diminish the meaningful participation of African Americans on criminal juries is amplified by increasing the number of cases in which there are two or fewer African-American votes.

In a large scale study of the pattern of prosecution peremptory challenges in Jefferson Parish, Louisiana, it was reported that prosecutors peremptorily challenged African Americans at more than three times the rate at which they challenged non-African Americans.[8]

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[8] *Blackstrikes, A Study of the Racially Disparate Use of Peremptory Challenges By the Jefferson Parish District Attorney's Office*, A Report of the Louisiana Crisis Assistance Center, (Sept. 2003), available at www.blackstrikes.com.

In the course of the same research the authors analyzed the number of juries that ended up with zero, one, two, three, etc., African-American members serving. These figures were compared with the number of juries with zero, one, two, three, etc., African-American members that one would expect if jury selection were not racially skewed.[9] The results were reported in the following table:

Blacks on Jury	What it should be	What it is
0	6%	22%
1	17%	35%
2	24%	23%
3	22%	12%
4	15%	6%
5	8%	1%
6	4%	1%

These results suggest that as a result of the extensive use of prosecution peremptory challenges against African Americans, the number of all white juries was triple that which would be expected in Jefferson Parish, where 23% of the population is African-American.[10]

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[9] The results of this further analysis are reported at www.blackstrikes.com (last visited 7/3/08). Using a statistical tool known as a Poisson Distribution, the authors estimated the distribution of African-American participation on juries expected in a race neutral jury selection process where the Parish was 22.9% African-American. This was compared to the percentage of juries with zero, one, two, etc., black jurors observed in 390 jury trials.

[10] The 2000 U.S. Census recorded the African-American population at 22.9% of the Parish. Profile of General

The percentage of juries with two or fewer African Americans went from an expected 47% to an overwhelming 80%.

The combined effect of racially disparate use of prosecution peremptory strikes and majority verdicts is dramatic. In a system of unanimous verdicts and even handed use of peremptories, there should be only 6% of juries in Jefferson Parish in which there is no guaranteed African-American voice; that is, those cases where an all white jury is empanelled.

However, given the reality of jury selection methods and the use of majority verdicts, it is 80% of juries in Jefferson Parish that have no guaranteed African-American voice; being those juries where two or fewer African Americans are empanelled.

Amicus is not suggesting that all juries split on racial lines or all jurors refuse to listen to or share the views of those of other races. However, these figures dramatically illustrate the inherent potential of a system of majority verdicts to undermine the benefits of full participation and legitimacy offered by unanimous verdicts, particularly when combined with the abuse of peremptory challenges.

III. Majority verdicts undermine full community participation in criminal justice decisions and the legitimacy of verdicts in the state with the highest rate of incarceration in the country and massive over representation of African Americans in the state's prison population.

Demographic Characteristics 2000, U. S. Census Bureau, available at

http://factfinder.census.gov/servlet/QTTable?_bm=n&_lang=en&qr_name=DEC_2000_SF1_U_DP1&ds_name=DEC_2000_SF1_U&geo_id=05000US22051 (last visited 7/3/08).

Louisiana has the nation's highest rate of incarceration. In 2007 the Department of Justice reported that 857 out of every 100,000 residents in Louisiana were held in custody serving a sentence of imprisonment of one year or more (1,649 per 100,000 males).[11] The national average was only 509 per 100,000 (957 per 100,000 males).

African Americans are massively over-represented amongst those persons incarcerated in Louisiana. Statewide, African Americans make up just under one-third of the total population.[12] However, they make up over two-thirds of Louisiana's prison population, including over two thirds of those sentenced to life imprisonment.[13]

One of the singular benefits that unanimity offers our criminal justice system is a guarantee of participation by minority groups in jury decision making.[14] Another is the perceived legitimacy of

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[11] Appendix 5. *Prison Inmates at Midyear 2007*, Department of Justice (June 2008), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/pim07.pdf (last visited 7/3/08).

[12] African Americans represent 31.7% of the population according to the Census Bureau 2006 estimate. *Louisiana QuickFacts*, U.S. Census Bureau, available at http://quickfacts.census.gov/qfd/states/22000.html (last checked 7/3/08).

[13] *Demographic Profiles of the Adult Correctional Population* and *Demographic Profiles of LIFERS Adult Correctional Population*, Louisiana Department of Public Safety and Corrections (March 31, 2008), available at http://www.corrections.state.la.us/view.php?cat=1&id=185#ms (last visited 7/3/08).

[14] The problem of under-representation of African Americans perpetuates itself in Louisiana, as individuals convicted of felony offenses are themselves unable to serve on juries. *State*

decisions that have been reached unanimously, with the concurrence of all sworn to decide, regardless of race.

Operating in a system where a jury verdict can expose a prisoner to perhaps the harshest sentencing regime in the country and where those sentences are borne disproportionately by members of the African-American community, the need for full participation in jury decisions and legitimacy of jury determinations is at its peak.

CONCLUSION

Louisiana's system of majority verdicts was produced in a Constitution designed to disenfranchise African Americans and to enshrine white majority power.

Majority verdicts in Louisiana directly diminish the twin goals of community participation and legitimacy of verdicts, particularly as a result of their effect on meaningful African-American participation in the administration of criminal justice.

The jury trial right found in the Sixth Amendment is designed to protect the individual from the oppression by the government. *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968).

Where a group forming a majority in the community can elect the District Attorney and the judge in a parish and then form an effective quorum on the jury, the jury no longer operates effectively as a check on oppression by the government. This is so

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v. Jacobs, 904 So. 2d 82, 91 (La.App. 5 Cir. 2005), *writ denied*, 927 So. 2d 282, 2006 La. LEXIS 1451 (La., Apr. 28, 2006).

whether the majority group is defined by race, class, religion or politics.

The drafters of the 1898 Constitution understood how to draft a constitution in order to secure majority power and it was they who enshrined majority verdicts in this state's criminal justice system.[15]

Majority verdicts in Louisiana are inconsistent with the Sixth Amendment jury trial guarantee and directly diminish that guarantee, particularly in their impact upon the African American community.

Respectfully submitted,

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[15] "The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives." P. Devlin, *Trial by Jury* 164 (1956), cited in *Duncan* at 156, n. 23.

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No. 07-1523

IN THE

Supreme Court of the United States

DERRICK TODD LEE,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL, FIRST CIRCUIT

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Sixth Amendment right to jury trial, as applied to the States through the Fourteenth Amendment, allows a criminal conviction based on a non-unanimous jury verdict.

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with more than 12,800 direct members worldwide and 94 state, local, and international affiliate organizations with another 35,000 members – including private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the fair and proper administration of criminal justice.[1]

Few protections are of more "surpassing importance" than the proscription against any deprivation of liberty without due process of law and the guarantee that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. *Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000); U.S. Const. amends. XIV, VI. This Court has recently reaffirmed not only that "the historical foundation for our recognition of these principles

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[1] Pursuant to this Court's Rule 37, amicus states that no counsel for any party authored this brief in whole or in part, and no person or entity other than amicus made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties were timely notified at least ten days prior to filing and have consented to the filing of this brief. A letter of consent executed by Respondent has been filed with the Clerk of the Court and counsel for Petitioner has filed a global consent.

extends down centuries into the common law," but also that these protections were instituted principally "to guard against a spirit of oppression and tyranny on the part of rulers" and stands "as the great bulwark of [our] civil liberties and political liberties." *Apprendi*, 530 U.S. at 477 (citations omitted). Thus, "trial by jury has been understood to require that '*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the *unanimous* suffrage of twelve of [the defendant's] equals and neighbours . . . .'" *Id.* (citing 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)) (second emphasis added). "Equally well founded is the companion right to have the jury verdict based on proof *beyond a reasonable doubt*." *Id.* (emphasis added).

The Louisiana statute at issue here provides that in cases where a defendant is charged with a non-capital offense for which the punishment may be "confinement at hard labor," the State need only persuade ten of twelve jurors to vote guilty in order to secure a conviction. La. C. Cr. P. art. 782 (2008). This statute, which purports to find constitutional refuge in the Court's deeply fractured 4-1-4 opinion in *Apodaca v. Oregon*, 406 U.S. 404 (1972) (upholding the constitutionality of a state statute providing for criminal convictions on the basis of 9-3 jury verdicts), severely diminishes the protections afforded the criminally accused by the right to jury trial and the reasonable doubt standard.

NACDL is in agreement with Petitioner that the Sixth and Fourteenth Amendments prohibit the States from securing criminal convictions on the basis of anything less than a unanimous jury verdict. NACDL submits that the fractured opinion in *Apodaca* is neither

sufficiently clear nor sufficiently consonant with intervening opinions of the Court to stand any longer as this Court's ruling on the issue. NACDL respectfully submits that the Court should reaffirm the traditional meaning of the Sixth and Fourteenth Amendments in declaring that Louisiana's non-unanimity rule is unconstitutional.

SUMMARY OF ARGUMENT

Developments in the Court's Sixth and Fourteenth Amendment jurisprudence in the wake of *Apodaca*, the weight of the empirical research conducted in response to *Apodaca*, and the experiences of various trial courts all present compelling grounds for a critical re-examination and abandonment of *Apodaca* as endorsing an unconstitutional abrogation of the rights to due process and a fair trial by jury. Accordingly, the NACDL respectfully submits that the Court should grant the petition and reject *Apodaca*.

REASONS FOR GRANTING THE PETITION

This Court has recognized that "[its] decisions interpreting the Sixth Amendment are always subject to reconsideration." *Duncan v. Louisiana*, 391 U.S. 145, 158 n.30 (1968); *see also Williams v. Florida*, 399 U.S. 78, 107 (1970) (Black, J., concurring in part and dissenting in part) (recognizing the Court's "duty to re-examine prior decisions to reach the correct constitutional meaning in each case"); Petition For Writ of Certiorari at 18-21. Here, where a prior decision of the Court is so misaligned with the historical underpinnings and constitutional stature of the right at issue – specifically, the right of a defendant to be free from conviction except by proof sufficient to convince a jury of defendant's guilt "beyond a reasonable doubt" –

the necessary pre-conditions for such a critical re-examination plainly exist.

Petitioner's brief in support of granting certiorari thoroughly canvases the fractured nature of the Court's decision in *Apodaca*. Amicus NACDL will not retread the same ground here. Instead, NACDL seeks to demonstrate the lack of any sound basis for the Court's decision in *Apodaca* – in what was an apparent detour from settled principles and established practice – and the practical consequences for the criminally accused of the continued vitality of *Apodaca*.

I. The Louisiana Statute, As Endorsed By *Apodaca* and *Johnson*, Runs Counter To The Historically Recognized Constitutional Protections Of Trial By Jury And The Reasonable Doubt Standard.

This Court has expressly held that "[b]ecause . . . trial by jury in criminal cases is fundamental to the American scheme of justice, . . . the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which – were they to be tried in a federal court – would come within the Sixth Amendment's guarantee." *Duncan*, 391 U.S. at 149. The right to trial by jury is historically entrenched, pre-dating the writing of the United States Constitution, having been brought to this country by those who emigrated from England "'as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.'" *Id.* at 154 (citations omitted). Fearing unchecked power, the framers of the Constitution insisted upon community participation in the determination of guilt or innocence of the accused, and by guaranteeing the accused a right to trial by jury,

provided him with "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Id.* at 156.

Just two years after deciding *Duncan*, the Court explicitly held that the Due Process Clause of the Fourteenth Amendment protects the criminally accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364 (1970). The *Winship* Court reasoned that the historic pedigree of the heightened standard of proof in criminal cases and the virtually unanimous adherence to the reasonable doubt standard in common law jurisdictions "'reflect[ed] a profound judgment about the way in which the law should be enforced and justice administered.'" *Id.* at 361-62 (quoting *Duncan*, 391 U.S. at 155). Because the criminally accused has an interest of "immense importance" and "transcending value" in his liberty and reputation at stake, the margin of error that exists in all litigation must be reduced as to the defendant by placing on the prosecution the burden of persuading the factfinder of his guilt beyond a reasonable doubt. *Id.* at 363-64. As the Court explained:

> use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without

> convincing a proper factfinder of his guilt with utmost certainty.

Id. at 364.

In both *Apodaca* and its companion case, *Johnson v. Louisiana*, 406 U.S. 356, 359 (1972), Petitioners argued that the failure to require unanimous verdicts in state criminal cases undermined the reasonable doubt standard. In *Apodaca*, Petitioners argued that the right to a jury trial provided by the Sixth Amendment and made mandatory on the states by virtue of the Fourteenth Amendment, *see Duncan v. Louisiana*, 391 U.S. at 145, carries with it a requirement that the prosecution must prove the accused guilty beyond a reasonable doubt, and, according to the Petitioners, a unanimous verdict is required to give substance to that standard. 406 U.S. at 406. Despite the obvious interrelationship between the right to a trial by jury and the right to be free from conviction except by proof of guilt beyond a reasonable doubt, Justice White and three other justices in *Apodaca* posited that "the Sixth Amendment does not require proof beyond a reasonable doubt at all." *Id.* at 412 (White, J.).

In *Johnson*, Petitioner was foreclosed from raising a Sixth Amendment argument, but instead argued that the Due Process Clause of the Fourteenth Amendment mandated a reasonable doubt standard, *see Winship*, 397 U.S. at 363-64, and that, under the Due Process and Equal Protection clauses, such a standard must be construed to require a unanimous jury verdict. 406 U.S.

at 358-59.[2] The Court rejected the argument that a unanimous jury verdict was required in all criminal cases. *Id.* at 359. More specifically, the *Johnson* majority held that "the fact of three dissenting votes to acquit raises no question of constitutional substance about either the integrity or the accuracy of the majority verdict of guilt." *Id.* at 360.

With admittedly little empirical or evidentiary support other than its own hunches and assumptions, the majority in *Johnson* rejected any notion that upon reaching the quorum necessary to convict, the majority jurors might simply cut short deliberations and ignore the reasonable doubts of their colleagues. *Id.* at 360-61. The Court concluded that before it would alter its own perceptions about jury behavior and overturn a legislative judgment that unanimity is not essential to reasoned jury verdicts, "we must have some basis for doing so other than unsupported assumptions." *Id.* at 361-62; *compare with id.* at 389-90 (Douglas, J., dissenting) ("I fail to understand why the Court should lift from the States the burden of justifying so radical a departure from an accepted and applauded tradition and instead demand that these defendants document with empirical evidence what has always been thought to be too obvious for further study.").

Recent developments in the Court's Sixth and Fourteenth Amendment jurisprudence, as well as the now substantial body of empirical evidence regarding

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[2] Petitioner in *Johnson* conceded that *Duncan*, which held that the Sixth Amendment guaranty of jury trial was applicable to the States, did not apply to his case because his trial occurred before *Duncan* was decided. *Johnson*, 406 U.S. at 358-59.

juror perceptions and behavior, demonstrate that both the common-law originalist conception of the rights at issue *and* the functional, reliability-based conception of those rights confirm the need to revisit the Court's rulings in *Apodaca* and *Johnson*.

Within a very few years after *Apodaca* and *Johnson* were decided, the Court began to re-examine the foundation of those decisions. In *Burch v. Louisiana*, 441 U.S. 130, 138 (1979), for example, the Court held that conviction by a non-unanimous six-person jury in a Louisiana criminal trial for a non-petty offense violated the Sixth Amendment right of the defendant to a trial by jury. The *Burch* Court buttressed its determination by looking to the current jury practices of the several States:

> [i]t appears that of those States that utilize six-member juries in trials of nonpetty offenses, only two, including Louisiana, also allow nonunanimous verdicts. We think that this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not.

Id. (citations omitted). *Burch* effectively rejected the subjective analysis embraced by *Apodaca* and *Johnson* and employed the "useful guide" that its predecessors eschewed.

More recently, the Court rejected the *Apodaca* plurality's premise that the reasonable doubt standard was untethered to the Sixth Amendment right to trial by jury. In *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993), this Court unanimously held:

> [i]t is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt. *In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.*

Id. at 278 (second emphasis added). The Court concluded that by providing the jury with a faulty "reasonable doubt" definition during the instruction stage, the trial court denied defendant the right to a jury verdict of guilt beyond a reasonable doubt. *Id.* at 281. That deprivation amounted to "structural error," the Court concluded, "the jury guarantee being a 'basic protectio[n]' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function." *Id.* at 281-82; *see also Cunningham v. California*, 549 U.S. 270, ___; 127 S. Ct. 856, 863-64 (2007) (applying the *Apprendi* rule to a state sentencing system and explaining that "*under the Sixth Amendment*, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established *beyond a reasonable doubt*, not merely by a preponderance of the evidence" (emphasis added)). Under the original common law conception, the right to trial by jury includes the right to be convicted only upon proof beyond a reasonable doubt.

II. A Substantial Body Of Post-*Apodaca* Case Law Demonstrates That The Court's Assumptions And Hunches Regarding Jury Behavior Were Flawed.

A growing body of case law demonstrates that the unanimity requirement provides the greatest assurance that the jury will fulfill its indispensible role in the criminal justice system and undercuts the hunches and assumptions relied upon by the plurality in *Apodaca* and the majority in *Johnson*, who determined that unanimity is not essential to the reasonable doubt standard.[3] For example, the more recent experiences of several courts from jurisdictions where the unanimity requirement is in force refute the *Johnson* Court's presumption that robust jury discussion and a thorough debate of the facts would not suffer as a result of a majority decision rule. *See Johnson*, 406 U.S. at 361 (concluding that the Court had "no grounds for believing that majority jurors, aware of their responsibility and power over the liberty

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[3] Notably, Justice Powell's concurrence respecting *Apodaca* relied, at least in part, on his observation that "[l]ess-than-unanimous verdict provisions . . . have been viewed with approval by the American Bar Association's Criminal Justice Project." 406 U.S. at 377. In connection with the more recently conducted American Jury Project, the American Bar Association (ABA), which NACDL understands will file a brief *amicus curiae* in support of Petitioner in this case, recently published and released its Principles for Juries and Jury Trials, available at http://www.abanet.org/jury/pdf/final%20 commentary_july_1205.pdf (last accessed July 3, 2008). Based upon a comprehensive review of the empirical research conducted over the past half-century, the ABA now recommends that, in accord with the established practice in federal criminal trials, "a unanimous verdict should be required in all criminal cases heard by a jury." *Id.* at 23-26 (Principle 4.B).

of the defendant, would simply refuse to listen to arguments presented to them in favor of acquittal, terminate discussion, and render a verdict," but instead posited that a "juror presenting reasoned argument in favor of acquittal would either have his arguments answered or would carry enough other jurors with him to prevent conviction").

These recent cases reveal that dissenting jurors frequently seek escape from deliberations rather than confront their peers or cast a vote against their consciences. *See, e.g.*, *Early v. Packer*, 537 U.S. 3, 4-6 (2002) (dissenting juror twice asked to be dismissed from jury rather than continue deliberations); *United States v. Dorsey*, 865 F.2d 1275, 1277 (D.C. Cir. 1989) (dissenting juror asked to be exchanged with alternate because she felt she would be "lying to myself to change my verdict just to have a unanimous decision"); *United States v. Norton*, 867 F.2d 1354, 1364 (11th Cir. 1989) (juror asked to be replaced because he entertained doubt as to defendant's guilt while majority did not); *United States v. O'Brien*, 609 F.2d 895, 896 (8th Cir. 1979) (juror asked to be removed from jury, explaining "my decision would not be fair to the U.S. people or to the defendant"); *Blackwood v. State*, 627 S.E.2d 907, 911-12 (Ga. Ct. App. 2006) (juror asked to be excused because she was the "only one with a different decision" and "wouldn't feel good tonight if I said he was guilty"); *Fairley v. State*, 467 So. 2d 894, 900 (Miss. 1985) (juror sought to be excused because he reached a decision that he felt would not be reached by the rest of the jury); *Wilson v. United States*, 419 A.2d 353, 355 (D.C. 1980) (juror left deliberations, and after being directed to

return, asked to be excused because she was the "only hold up").[4] If dissenting jurors are willing to seek escape in unanimity jurisdictions, it only stands to reason that these same jurors, when sitting on juries in non-unanimity jurisdictions, would silently accept the decision of the majority rather than force a discussion of the charges.[5]

It is difficult for the average layperson – frequently not skilled in the arts of rhetoric or advocacy – to marshal his argumentative skills to defend his dissenting view or sway others to his side. Juries are rarely composed of Ciceros, Websters and Douglasses. A dissenting juror who knows the decision is foretold once a ten-juror quorum is achieved has little motivation to challenge the judgment of his peers; as a result, he commands less attention from the majority. When unanimity is required, however, the full benefits of the jury system reveal themselves. Not only must the dissenter attempt to persuade his peers, but the majority must also persuade the dissenter. Such a system necessarily requires a robust and probing discussion of the case.

When a juror has a deciding vote, it is then that percolations of doubt are given voice. *See, e.g., Early*, 537 U.S. at 4-5 (upon polling of the jury, juror revealed

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[4] In each of these cases, the jury eventually convicted the defendant. However, it is impossible to know how many similar situations resulted in a hung jury, as these are unlikely to appear in published decisions.

[5] In the unanimity cases, jurors who have reservations about forcing a debate are more readily identified and instructed by the Court on their civic duty – an opportunity that may be lost in non-unanimity jurisdictions.

dissent with verdict); *In re Hoare*, 155 F.3d 937, 939 (8th Cir. 1998) (juror refused to affirm guilty verdict when polled). In non-unanimity jurisdictions, a juror with doubts may remain silent, morally secure that it is not his vote that is convicting the accused; no such luxury is available where unanimity is required. "[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the *community participation and shared responsibility* that results from that group's determination of guilt or innocence." *Williams v. Florida*, 399 U.S. 78, 100 (1970) (emphasis added). The best guarantee of *true* community participation is the unanimity requirement.

III. Empirical Research On The Behavior Of Juries Confirms The Wisdom Of The Historical Unanimity Requirement.

The value of the unanimity requirement demonstrated by the events documented in the post-*Apodaca* jurisprudence is validated by a now substantial body of empirical research. For example, research on jury decision-making published between 1955 and 1999, much of which was inspired by the Court's decisions in *Apodaca* and *Johnson*, concludes that juries not required to reach a unanimous decision tend to take less time to arrive at a verdict, take fewer polls, cease deliberating when a quorum is reached, and report being less satisfied and confident that the jury reached the correct verdict. Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622, 669 (2001); *see also* Reid Hastie et al., INSIDE THE JURY 29-32, 238 (Harv. Univ. Press 1983).

Recent studies have also found that, contrary to the theories of non-unanimous jury system advocates, there is no evidence that outvoted holdouts are irrational or eccentric in ways that justify isolating them or failing to seriously consider their views. Shari Seidman Diamond et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 Nw. U.L. Rev. 201, 205-06 (2006) (also noting the scant empirical evidence available to the *Apodaca* and *Johnson* Courts and concluding that "the benefits of unanimity outweigh its costs"). Further, the existing research indicates that non-unanimous voting schemes "are likely to chill participation by the precise groups whose exclusion the Court has proscribed in other contexts." Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1310-12 (2000) (also noting the limited empirical data available to the *Apodaca* and *Johnson* Courts and concluding that in light of the substantial evidence contradicting the assumptions made by the *Johnson* majority and *Apodaca* plurality, "a stubborn adherence to precedent would be a perverse dynamic"); *see also* Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 Del. L. Rev. 1 (2001) ("effects of eliminating unanimity tend to mirror the effects of reduction in jury size by lessening the strength of those arguing a minority position and by undermining the quality and accuracy of jury decision making").

NACDL submits that this compelling body of empirical research confirms the wisdom of the unanimity requirement established by our forefathers and reveals the arbitrary nature of the Court's departure, in *Apodaca* and *Johnson*, from the Founders' original intent.

IV. The Louisiana Statute Dilutes The Reasonable Doubt Standard For Defendants Accused Of Non-Capital Crimes.

The distinction established by the Louisiana Legislature – requiring unanimity in capital cases but dispensing with the requirement in all *other* felony cases, some of which may be punishable by life in prison without parole, cannot be justified. In addressing the Equal Protection arguments raised by the Petitioner in *Johnson*, which involved a predecessor to the statute at issue here, the Court acknowledged that the distinction between the unanimity requirement for capital offenses and the non-unanimity rule for crimes punishable by hard labor or life in prison "obviously" reflected the Louisiana Legislature's "inten[tion] to vary the difficulty of proving guilt with the gravity of the offense and the severity of the punishment." *Johnson*, 406 U.S. at 364-65. But Louisiana has not made proving guilt in capital cases *more* difficult. Rather, the Louisiana statute merely diminishes the constitutional protections for defendants charged with all other felony offenses by diluting the reasonable doubt standard that must be met in non-capital cases.[6] This reservation of full

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[6] *See, e.g., United States v. Correa-Ventura*, 6 F.3d 1070, 1076-77 (5th Cir. 1993) ("The unanimity rule is a corollary to the reasonable-doubt standard, both conceived as a means of guaranteeing that each of the jurors 'reach[] a subjective state of certitude' with respect to a criminal defendant's culpability before rendering a conviction. . . . The requirement that all twelve jurors be in agreement as to a defendant's guilt is employed to give substance to the reasonable-doubt standard; *if a verdict is less than unanimous, the dissension tends to show that a reasonable doubt*

constitutional protection in Louisiana only for those cases in which the most severe punishment is a possibility may be efficient for Louisiana law enforcement authorities and prosecutors, but it fails to offer defendants faced with life imprisonment the full panoply of constitutional protections secured by the Sixth and Fourteenth Amendments.

Louisiana's statute also fails to offer those who participate on Louisiana juries full confidence that their views – as well as their votes – will count equally with those of their peers. A unanimity requirement allows each juror to have equal power – in essence a veto – as to the question at hand. A majority requirement quickly determines whose views must be subordinate and may be discounted entirely, or worse, affirmatively silenced on the ground that such an airing is a waste of the majority's time. While Louisiana may perceive substantial efficiencies that might be achieved through the use of non-unanimous juries – *e.g.*, reduction in the time and expense associated with the administration of its system of criminal justice – those interests, which are speculative at best, must give way to the constitutional guarantee that no person shall be convicted of a crime on the basis of anything less than proof of guilt beyond a reasonable doubt. *See Burch v. Louisiana*, 441 U.S. 130,

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exists as to the criminal activity charged.") (citations omitted) (emphasis added); *United States v. Lee*, 317 F.3d 26, 36 (1st Cir. 2003) ("[T]he unanimity requirement . . . helps to ensure that no defendant will be convicted unless the government has carried its burden of proving guilt beyond a reasonable doubt. . . . *[L]eaving jurors free to convict despite disagreements about critical facts will imperil the integrity of the reasonable doubt standard.*") (emphasis added).

138-39 (1979). The Louisiana majority-vote conviction scheme falls short of maintaining the confidence of every individual in our free society that "his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty." *Winship*, 397 U.S. at 364. The continued allowance for such schemes and the concomitant erosion of the reasonable doubt standard dilute the moral force of the criminal law such that people may well be left in doubt "whether innocent men are being condemned." *Id.*

V. The Majority-Verdict Scheme Severely Disadvantages Defendants During Jury Selection.

In the most practical sense, the Louisiana statute requires the defense to create a doubt in the minds of three jurors, not in order to prevail, but merely to hang the jury. One point in the criminal trial process where allowance for non-unanimous convictions undermines defense strategy is in the exercise of peremptory challenges. A defendant in a non-capital case in Louisiana is afforded only twelve peremptory challenges. La. C. Cr. P. art. 799 (2008). This is woefully inadequate where defense counsel must create doubt in the minds of 25% of the jury merely to avoid conviction and obtain a re-trial.

The peremptory challenge is one of the oldest established rights of the criminal defendant. *See, e.g., Lewis v. United States*, 146 U.S. 370, 376 (1892). The importance of this right is evidenced by the remedy courts have afforded defendants deprived of the right – reversal of conviction even without proof of prejudice. *Id.* at 376. The principal purpose of the peremptory challenge is to enable a litigant to remove a potential

juror in whom the litigant perceives bias or hostility. *Swain v. Alabama*, 380 U.S. 202, 212 (1965), *overruled on other grounds by Batson v. Kentucky*, 476 U.S. 79 (1986). The effective exercise of this right is especially important in circumstances where counsel finds it necessary to conduct vigorous questioning of prospective jurors to expose possible causes for challenge.

In cases where conviction may result upon a non-unanimous verdict, defense counsel has a duty to be especially vigorous in her efforts to expose bias, hostility and indifference in prospective jurors. Under federal law, in non-capital felony cases, it is recognized that a defendant should be allotted ten peremptory challenges to accomplish this objective, in circumstances where a single dissenting vote will permit the defendant to avoid conviction. Fed. R. Crim. P. 24 (b)(2) (2008). Where, however, a defendant must persuade three jurors in order to avoid conviction, and defense counsel must ferret out not only those prospective jurors who may be biased or hostile, but also those of weak will who cannot take or vocalize an unpopular stance, the importance of having an adequate number of peremptory challenges is much more pronounced. The allotment to defendants in Louisiana of a mere twelve peremptory challenges, while permitting conviction upon a vote of only ten jurors, tilts the field dramatically in favor of the government.

VI. Allowing Conviction On The Basis Of Non-Unanimous Juries Is Inherently Coercive And Discourages Juror Dissent.

A jury instruction approving a 10-2 or 11-1 verdict essentially admonishes a dissenting juror that his view of the evidence is likely inaccurate, and that his theory of the case is entitled to no deference. Indeed, such an instruction is the equivalent of admonishing the jury

that "a 'dissenting juror should consider whether his doubt was a reasonable one . . . [when it made] no impression upon the minds of so many men, equally honest, equally intelligent with himself.'" *Johnson*, 406 U.S. at 361-62 (*quoting Allen v. United States*, 164 U.S. 492, 501 (1896)) (alteration in the original). Notably, the dangers of such an explicit suggestion have been recognized by the many courts of appeal that have employed their supervisory powers to rewrite the *Allen* instruction to remove the coercive sting that it inflicts on dissenting voices. *See, e.g., United States v. Paniagua-Ramos*, 135 F.3d 193, 197 (1st Cir. 1998) (stating that *Allen* instruction must tell members of both the majority and the minority to reexamine their positions); *United States v. Burgos*, 55 F.3d 933, 936 (4th Cir. 1995) (recognizing that "[i]n the traditional *Allen* charge, one of the most likely sources of coercion is rooted in the court's admonition to the jury that members of the minority reconsider the position taken by those in the majority"); *United States v. Thomas*, 449 F.2d 1177, 1187 (D.C. Cir. 1971) (en banc) (rejecting the *Allen* charge and adopting the ABA instruction); *United States v. Fioravanti*, 412 F.2d 407, 417 (3d Cir. 1969) (holding instruction that a juror should "distrust his own judgment if he finds a large majority of the jurors taking a view different from his" is reversible error); *United States v. Brown*, 411 F.2d 930, 933-34 (7th Cir. 1961) (rejecting *Allen* charge in future cases and adopting the

ABA instruction).[7]

Not surprisingly, empirical research has revealed that this tilting of the field on which jury trials are conducted in favor of the government has a measurable impact on the number of hung juries. Juries not required to be unanimous tend to hang less often. *See* Devine, *supra* 13, at 669; ABA Principles, *supra* note 3, at 25 (survey of trial judges found that, where

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[7] The majority of states have also either completely rejected the traditional, one-sided *Allen* charge, *State v. Thomas*, 342 P.2d 197, 200 (Ariz. 1959); *Taylor v. People*, 490 P.2d 292, 295 (Colo. 1971); *State v. Fajardo*, 699 P.2d 20, 25 (Haw. 1985); *State v. Flint*, 761 P.2d 1158, 1164 (Idaho 1988); *State v. Randall*, 353 P.2d 1054, 1058 (Mont. 1960); *State v. Howard*, 537 N.E.2d 188, 192 (Ohio 1989); *State v. Ferguson*, 175 N.W.2d 57, 61 (S.D. 1970); or have replaced the traditional charge with language more balanced and salutary to the minority. *Fields v. State*, 487 P.2d 831, 842 (Alaska 1971) (Alaska 1987) (rejecting *Allen* charge in favor of ABA Standards Relating to Trial by Jury (1968) § 5.4, pp. 145-46 (approved draft) (predecessor to 3 ABA, Standards for Criminal Justice, Standard 15-4.4 (2d Ed. 1980)); *People v. Gainer*, 566 P.2d 997, 1005-09 (Cal. 1977); *Winters v. United States*, 317 A.2d 530, 533 (D.C. 1974); *People v. Prim*, 289 N.E.2d 601, 609-10 (Ill. 1972); *Lewis v. State*, 424 N.E.2d 107, 110-11 (Ind. 1981); *State v. Nicholson*, 315 So. 2d 639, 641, 643 (La. 1975); *State v. White*, 285 A.2d 832, 838 (Me. 1972); *Goodmuth v. State*, 490 A.2d 682, 687 (Md. 1985); *Commonwealth v. Rodriquez*, 300 N.E.2d 192, 200-02 (Mass. 1973); *People v. Sullivan*, 220 N.W.2d 441, 450 (Mich. 1974); *State v. Martin*, 211 N.W.2d 765, 771 (Minn. 1973); *Gearlson v. State*, 482 So.2d 1141, 1143 (Miss.1986); *State v. Garza*, 176 N.W.2d 664, 666 (Neb. 1970); *State v. Czachor*, 413 A.2d 593, 597-98 (N.J. 1980); *Commonwealth v. Spencer*, 275 A.2d 299, 303-04 (Pa. 1971); *State v. Patriarca*, 308 A.2d 300, 322-23 (R.I. 1973); *Kersey v. State*, 525 S.W.2d 139, 144 (Tenn. 1975); *State v. Perry*, 306 A.2d 110, 112 (Vt. 1973); *Quarles v. State*, 233 N.W.2d 401, 402 (Wis. 1975); *Hoskins v. State*, 552 P.2d 342, 347 n.8 (Wyo. 1976).

unanimous verdicts were required, 5.6% of juries ended in deadlock, compared with 3.1% where majority verdicts were permitted) (citing Harry Kalven & Hans Zeisel, THE AMERICAN JURY 463 (1966)). Although the differentials are obviously not pronounced, they do suggest that in a small number of cases, the accused would have fared better under a system requiring unanimity, as opposed to one employing a majority decision rule. *See Johnson*, 406 U.S. at 390 (Douglas, J., dissenting). This is especially true given that only one-third of the cases resulting in hung juries are re-tried; half are disposed of by plea agreements or dismissals. ABA Principles, *supra* note 3, at 25 (citing Paula L. Hannaford-Agor et al., ARE HUNG JURIES A PROBLEM? 67 (2002)). In all events, however small the differentials may be, to tilt the scale to any degree in favor of the government undermines the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Winship*, 397 U.S. at 1077 (Harlan, J., concurring). Where that sacrifice must be borne by the criminally accused so that the State may pursue interests that are "speculative, at best," these governmental interests must give way to the public's interest in the reliability and accuracy of the jury system. *Burch*, 441 U.S. at 139.

Finally, the abandonment of unanimity almost certainly adversely impacts the defense of the criminally accused in ways that have not yet been studied or analyzed. For example, it seems almost a truism that in states that allow for conviction by non-unanimous juries, the percentage of criminal defendants who enter into plea bargains, rather than go to trial against a prosecutor unencumbered by the constitutionally heightened burden of proof, will be markedly higher

than in those states where the unanimity requirement is employed to give substance to the reasonable doubt standard. In sum, statutes permitting non-unanimous guilty verdicts create both practical and legal impediments that unfairly increase the likelihood of conviction.

CONCLUSION

For all the reasons state above, the Court should grant the petition.

Respectfully submitted,

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